POLITICAL OBLIGATION AND DEMOCRATIC COMMUNITY: AN ACCOUNT OF THE DEMOCRATIC CITIZEN'S DUTY TO UPHOLD THE LAW

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POLITICAL OBLIGATION AND DEMOCRATIC COMMUNITY: AN ACCOUNT OF THE DEMOCRATIC CITIZEN'S DUTY TO UPHOLD THE LAW

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I argue that citizens of a suitably democratic community will have an important duty to uphold their community's laws, even those laws they reasonably think to be unjust, because upholding the law is required if they are to respect their fellows as free and equal citizens. The version of the problem of political obligation that I address, roughly put, is to explain how laws may bind citizens of a community without threatening their status as free persons. This version of the problem must be addressed because, on the one hand, the duty to uphold the law, as a duty to obey (or defer to) another, seems incompatible with freedom, but, on the other, the aspiration of a community of free and equal citizens—the aspiration motivating much of liberal political philosophy—is only realizable if free citizens can have such a duty.

I argue here that the persistence of deep but reasonable disagreement between persons about justice requires that an authoritative scheme of laws govern them. However, a law can be authoritative only if it is enacted in a manner that respects all citizens as free and equal, including those citizens who reasonably disagree with that law. Democratic procedures, I argue, are therefore necessary to achieve authoritative law; but, importantly, they are not sufficient, for a problem of freedom still remains. Drawing on the results of an argument about deference in close personal friendships, I argue that

democratic procedures result in authoritative law only when those procedures are embedded within a democratic *community* whose citizens are bound, in their political choices, by genuine ties of civic friendship.

BIOGRAPHICAL SKETCH

Daniel Alan Koltonski received his B.A. in Philosophy with High Honors from Swarthmore College in 2002. He received his M.A. in Philosophy from Cornell University in 2007. He has taught at Cornell University, Auburn Correctional Facility, the Governor's School of North Carolina, Haverford College and Temple University. He currently lives in South Philadelphia.

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0. INTRODUCTION

One longstanding aspiration of liberal political philosophy has been to develop an account of a community of free and equal citizens.[1] Such an account will, unsurprisingly, be quite complex, for it must address a variety of important questions, including, for instance, questions about individual rights, distributive justice, economic opportunity, coercion and punishment, culture and identity, and democracy.

One important task faced by this sort of account is explaining how such a community's laws may bind its citizens with a duty to obey without that duty of obedience undermining their status as free persons. (This is, of course, a version of the perennial problem of political obligation.) This task, however, is a difficult one: On the one hand, a community of free and equal citizens seems only realizable if its laws can bind free citizens with a duty of obedience. But, on the other hand, as a duty to obey (or defer to) another even when one disagrees with that other's judgment, a duty to obey the law seems itself incompatible with the freedom of citizens. Despite its difficulty, the task is necessary, for, if the duty to obey the law is indeed incompatible with the freedom of citizens, then the ideal of a community of free and equal citizens that animates much of liberal political philosophy is not, in the end, a realizable ideal.

I argue here that citizens of a suitably democratic community will have an important duty to uphold their community's laws, even those laws they reasonably think to be unjust, because upholding the law is required if they

[1] John Rawls' *A Theory of Justice*, published in 1971, is perhaps the best recent example of such an account. See Rawls (1999d). The work of Ronald Dworkin, taken together, is another example of this sort of account. See, for instance, Dworkin's *Law's Empire* (1986) and *Sovereign Virtue* (2000).

are to respect their fellows as free and equal citizens. My argument has two main components. (1) I argue that the persistence of deep but reasonable disagreement between persons about rights and justice requires that an authoritative scheme of laws govern them. However, a law can be authoritative only if it is enacted in a manner that respects all citizens as free and equal, including those citizens who reasonably disagree with that law. And so, (2) I argue that democratic procedures are necessary to achieve authoritative law; but, importantly, they are not sufficient, for a problem of freedom still remains. Drawing on the results of an argument about deference in close personal friendships, I argue that democratic procedures result in authoritative law only when they are embedded within a democratic community, that is, within a community whose citizens are motivated, in their political choices, by genuine ties of civic friendship.

The impetus behind the development of this 'democratic community' account of political obligation has been a concern to explain what seems to me the hardest kind of case for an account of political obligation to explain: The case of an engaged and conscientious citizen—a citizen whose main aim is to live justly among her fellows—who is confronted by a law she reasonably thinks to be unjust. How is it that she can have a duty to uphold that law, a duty that overrides her usual prerogative, as a free person, to act on her own moral judgments?

This account, then, is not directly concerned with the case of Oliver Wendell Holmes' "bad man," who is motivated only by the sanctions that are likely to meet his disobedience and so who does not "find his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of

conscience."[2] It is also not directly concerned with the case of the free rider, who disobeys when such disobedience will benefit his interests because he realizes that he can rely on others' obedience to provide the benefits of the rule of law.[3] The account is concerned, instead, with the citizen who is tempted to disobey a law for *moral* reasons: She wants to do the morally right thing and wonders whether she has any moral reasons to obey that compete with the moral reasons to disobey that she thinks are given by the injustice of the law in question.[4]

My argument for the democratic community account of political obligation is divided into seven chapters:

In Chapter I, I set out my understanding of the problem of political obligation and authority in order to make precise the important worry that subjection to authority is incompatible with freedom. In Chapter II, I present A. John Simmons' important challenge: Virtually no citizen of even a reasonably just state possesses either political obligation (i.e., the duty to obey the law *qua* law) or other political duties (i.e., ones owed to others *qua* fellow citizens). For Simmons, individual consent is the only basis for political ties

[2] Holmes, "The Path of the Law" (1897), 497.
[3] This case of the free rider motivates those accounts that claim that disobedience is wrong because it is unfair to those who do obey. This 'fairness' or 'fair play' account is arguably the dominant liberal account of political obligation in the recent literature on the topic. For discussion of this sort of account, see Chapter III.
[4] This account is concerned, then, mainly with what Ronald Dworkin in *Sovereign Virtue* (2000) has called "choice-insensitive" issues. "Choice-sensitive" issues are, as Dworkin explains, "those whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the political community." A choice-insensitive issue, then, is one whose correct solution does not depend essentially on the preferences of citizens within the community. For example, "[t]he decision whether to kill convicted murderers or to outlaw racial discrimination in employment… seems choice-insensitive… [T]he right decision on these issues [does not] depend in any substantial way on how many people want or approve of capital punishment or think racial discrimination unjust. The case against capital punishment… is just as strong in a community where a majority of members favors it as in a community of people revolted by the idea" (Dworkin (2000), 204). When this account talks about the citizen who is confronted with a law she thinks unjust, what she thinks is that the law has gotten some choice-insensitive issue concerning rights or justice wrong.

compatible with a person's freedom. And, he argues, since most citizens do not consent, they lack both political obligation and other political duties.

In Chapter III, I argue that even citizens without political obligation will have other important political duties of fairness to each other qua citizens. I defend a distinctive version of the principle of fairness that claims that individuals who rely on a cooperative scheme for some benefit have, because of this reliance (and regardless of consent), a duty to share in that scheme's burdens. And they have this duty of fairness because fulfilling it is required if they are to respect the freedom of the cooperators. I conclude the chapter by arguing that the principle of fairness cannot ground political obligation.

In Chapter IV, I defend the Kantian argument that political obligation is grounded in the natural duty of justice. Kant's insight is that even persons acting conscientiously and in good faith will disagree about their own and others' rights and freedoms. This disagreement will be *reasonable* and, as Rawls emphasizes, a permanent feature of a society of free and equal persons. But such disagreement, by making individuals' rights uncertain, poses a serious threat to their freedom. Authoritative law is necessary to settle such disagreements so that individuals may live together as free and equal. And so, if a scheme of law guarantees for everyone equal status as free persons, citizens have no complaint of freedom against being subject to it.

Of course, because of the reality of disagreement among citizens, laws must also be enacted in ways that respect all as free and equal if they are to be authoritative. In Chapter V, I defend a constitutionalist conception of democracy: A majority's decision must satisfy certain substantive constraints if it is to count as worthy of being upheld by citizens. On my account, these non-procedural constraints on legitimacy are justified because laws that do

not satisfy them count as *unreasonable* from the perspective of free and equal citizenship. And excluding unreasonable views is the only role for substantive constraints in a theory of democratic law: When disagreements about justice are reasonable, no substantive constraints on the legitimacy of a majority's decision can be justified. Such constraints fail to respect the citizens in that majority as free and equal participants in governing.

This account of democratic procedures, however, is not enough. Consider the reasonable citizen who finds herself with a duty to uphold a democratic law she finds unjust: she faces a conflict between abiding by democratic law or by the deliverances of her own conscience about justice. By requiring her to act against her own conscience, a duty to uphold the law may, to that extent, infringe on her freedom. In Chapter VI, I begin to address this conscience worry by defending a novel claim about close personal friendships, namely that close friends have a duty of friendship sometimes to defer to each other when doing so promotes the other's interest in exercising choice. I also argue that such deference is compatible with that person's status as a free individual, for she defers out of her basic commitment to being a good (and loyal) friend. In this way, when it is a duty of a valuable relationship, deference is compatible with freedom.

In Chapter VII, I use the insights from the account of friendship to show how a community's law can achieve genuine authority and so how its members can come to have political obligation. I develop an account of a democratic community in which co-citizenship is a valuable relationship constituted, in part, by a duty to defer to the law. The reasonable citizen will possess a basic commitment to being a good and loyal citizen. In such a community, the laws will reflect the reasonable and good faith attempts of

citizens to create a society of free and equal persons; and the reasonable citizen will recognize that, as such, these laws are worthy of being upheld, even when she disagrees with them. This sort of community must be democratic, I argue, but not simply institutionally: its citizens must possess a kind of civic friendship—a generalized and mutual care for and trust in each other as citizens—in order for citizens to have a duty to uphold the law.

I. THE DUTY TO UPHOLD THE LAW

The problem of political authority and obligation—whether citizens have a duty to obey the law—is a standard problem in political philosophy. In this chapter, I set out my understanding of this problem. After explaining why there are actually two problems of political obligation, of which the duty to uphold the law is one, I offer an account of practical authority and the subject's duty to obey such an authority, focusing on the ways the exercise of practical authority affects the deliberations of one subject to it. By making clear here how the exercise of practical authority affects the subject's deliberations, we will be able better to understand the worries, discussed in the next chapter, that subjection to the authority of law is somehow incompatible with being a free person.

I also defend here the claim that law, by its nature, claims authority over citizens. And, at the end of the chapter, I confront the simple and powerful argument from the stop sign in the desert, first offered by M.B.E. Smith. This argument must be addressed and shown mistaken because, if it were to be correct, the project here of developing an account of the democratic citizen's duty to uphold the law would be unable even get off the ground.

1. THE PROBLEMS OF POLITICAL OBLIGATION

As Bhikhu Parekh has pointed out in his "A Misconceived Discourse on Political Obligation," when philosophers have investigated the kinds of duties that citizens have in virtue of their citizenship in a certain state, they have primarily focused on the duty to obey the law.[1] As he says about Hobbes, "the

[1] Parekh, (1993). By 'citizens' here, I mean those people who are under the same *de facto* political authority, or, in other words, those whom the same legal system claims have a duty to uphold its laws.

central problem of political philosophy for him was to show how the sovereign acquired the right to command the obedience of naturally free and equal men, or, what came to the same thing, how they acquired the obligation to obey it."[2] But, as Parekh argues, narrowing the question of what duties citizens have to the question of whether they have a duty to obey the law is misconceived: political life is much broader than the relationship of a citizen to the law, and the important duties that she has as a citizen are likely to include duties other than a duty to obey the law. To ask only about the duty to obey the law, then, is to risk an impoverished picture of political life and citizenship.[3]

To ask only about the duty to obey the law also risks overemphasizing that duty, making it out to be more important to political life than it really is. If the duty to obey the law is all, then the denial of this duty—a view called 'philosophical anarchism'—implies that citizenship is not itself a morally significant tie and so that persons who find themselves living in the same political community and sharing the same institutions owe nothing at all to

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[2] Parekh (1993), 236. Notice that, on Hobbes understanding of the issue, the relationship of authority and obedience is between the sovereign and the subject, and these are always different persons: the sovereign is not also a subject. But, as will become clear later, this is not the only way to understand this relationship, for, in a democratic community, the citizens will have dual roles as both part of the sovereign—insofar as they are co-authors of the law—and as subjects. The obedience they owe, then, they will owe to each other. Allen Buchanan's claim in *Justice, Legitimacy and Self-Determination* that the question of political authority and obedience is not among the central concerns of political philosophy seems to depend on understanding the relationship at issue in the same way as Hobbes does as a relationship between the government and citizens. See Buchanan (2004), 237-241.

[3] Parekh (1993), 246. For instance, in *The Authority of the State*, Leslie Green claims that, if citizens have no duty to obey the law, they will not have any other duties that might seem to be required by citizenship. See Green (1988), 223. In "Special Ties and Natural Duties," Jeremy Waldron focus is first on "what we owe the state" but then quickly narrows to "our moral relation to the law," even though what we owe the state (or what we owe each other as citizens of the state) may be more than obedience to law. See Waldron (1993), 3. See also the essays collected by William Edmundson in *The Duty to Obey the Law* (1999), where it seems assumed in many that the duty to obey is the only political obligation or duty to be considered. A notable exception is A. John Simmons' *Moral Principles and Political Obligations* (1979).

each other in virtue of their shared community. This result can seem quite implausible, and so philosophical anarchism a very extreme view. However, if sharing a community may generate other duties of citizenship, then the denial of a duty to obey will not seem quite as extreme: the denial will be a denial not of the moral significance of the relationship of citizenship *tout court* but only of the moral significance of the citizen's relationship of subjection to the law. If a citizen can have various important political duties—duties to participate in public life, duties of special care towards their fellow citizens, duties to defend the country, or even duties to support those beneficial public institutions in place—without also having a duty to obey the law, then the denial of this latter duty, though important, is not automatically the denial of any and all political duties.[4]

There is, then, not one 'problem of political obligation,' but rather two: the first concerns whether citizens have *any* moral ties to each other *qua* citizens, while the second concerns whether they have the specific tie of joint subjection to a genuinely authoritative scheme of law. Let us distinguish, then, between 'broad' and 'narrow' political obligation: broad political obligation consists in all the duties of citizenship, while narrow political obligation is simply the duty to obey the law *qua* law.[5] The problem of narrow political obligation, then, concerns whether (and, if so, under what circumstances) citizens have a duty to obey the law. And the problem of broad political obligation concerns whether (and, if so, under what

[4] Except, perhaps, on account such as Hobbes', for his account seems to imply that the citizen only has those other political duties to his fellows that the sovereign has declared via the exercise of his authority he has. In this way, these other political duties derive their status as duties from the political authority of the sovereign and so they are derived from the subjects' duty, owed to the sovereign, to obey the law.

[5] Leslie Green makes a different distinction between broad and narrow *conceptions* of political obligation. See Green (1988), 222.

circumstances) citizens have the other duties of citizenship that one might think important.[6]

This dissertation is primarily concerned with the problem of narrow political obligation. And it is concerned with one particular version of this problem, namely the version confronted by what John Rawls has called 'liberalisms of freedom.'[7] A liberalism of freedom, as Rawls uses the term, is an account that endorses the traditional liberal institutions—making the account a version of liberalism—and does so on the grounds that these institutions enable and protect the individual freedom of all citizens.[8] The just community, on this sort of view, is just insofar as it enables and protects individual freedom, and so freedom is the ground value.[9] The problem of narrow political obligation for a liberalism of freedom concerns whether (and, if so, under what circumstances) a citizen can be both free and subject to the authority of law. This dissertation examines several different accounts that philosophers have recently put forward to solve this problem of narrow

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[6] For the remainder, when talking about 'the problem of political obligation,' I will note whether I am talking about the narrow or broad version of the problem. But, when talking about the duty to obey the law or about the other political duties, I will use the term 'political obligation' to refer to the former and 'political duties' to refer to the latter. This is only for convenience's sake, but it does seem appropriate given that, in most discussions of this topic, 'political obligation' and 'duty to obey the law' are taken to be synonymous, even in those discussions that do not require that political obligation be voluntarily assumed.

[7] For Rawls' use of the term, see, for instance, Rawls (2000), 330.

[8] Such an account can make room for considerations of welfare or well-being, but only insofar as persons need a certain level of welfare to live freely. Though quite different in many respects, both A. John Simmons' Lockean consent account of political obligation and various Kantian natural duty of justice accounts count as 'liberalisms of freedom' accounts of political obligation. Thomas Christiano's account of the authority of democratically produced law in *The Constitution of Equality* is a liberalism that is not a liberalism of freedom. See Christiano (2008).

[9] By freedom (or autonomy) I mean something more than simply negative freedom. Freedom includes an active component of self-determination, of abiding by one's own will. As Joseph Raz puts it, free agents are those who "can shape their life and determine its course. They are not merely rational agents who can choose between options after evaluating relevant information, but agents who can in addition adopt personal projects, develop relationships, and accept commitments to causes, through which their personal integrity and sense of dignity and self-respect are made concrete. In a word, [they] are part creators of their own moral world" (Raz (1986), 154).

political obligation, and, through this examination of these extant accounts, it builds its own distinctive account of how this problem is to be solved.

It is misleading, however, to understand this problem of narrow political obligation as concerned solely with the duty to *obey* the law, for obedience is only one of several possible responses that can be required of a citizen when she is confronted by authoritative law. Consider a case Jeremy Waldron offers in his *Law and Disagreement*: Suppose a new set of elected officials repeals, in the right way, a legitimate law that those officials thought unjust or unwise.[10] Once repealed, of course, it loses its status as law and so citizen need not obey it. But these officials may not then go on to refuse to carry out the appropriate punishments against those who had violated the now repealed law when it was still in forse, for such a refusal would amount to the denial that the law, prior to being repealed, was genuine law for the community.[11] In this way, even though this law no longer requires obedience—it is no longer law—its (former) status as legitimate law nevertheless requires certain actions of officials.

What about a case that concerns citizens rather than officials? Consider jury nullification: If the relevant law is legitimate, jury members may not refuse to convict someone on grounds that the law is, on their view, unjust or unwise. For, were they to do so, they would be denying that the law at issue

[10] By 'legitimate law,' I mean law that possesses genuine authority for citizens. What is meant by 'authority' is explained in the next section.

[11] Waldron's specific case comes from the United Kingdom: "In 1972, the Conservative government in Britain passed a statute—the Housing (Finance) Act—requiring local authorities to raise public housing rents to market rates. When a socialist authority in Derbyshire (the borough of Clay Cross) refused to do this, the councillors' own assets were surcharged (in accordance with the relevant principles of local government finance) and several became bankrupt and thus disqualified from holding public office. In 1973, the opposition Labour party pledged not only to repeal the measure but to remove all penalties from, and indemnify against disqualification, the Clay Cross councillors" (Waldron (1999), 100). I have my doubts about this particular case, given the details.

is genuine law for the community of which they are a part. And so, even though in neither case does the legitimacy of law require of the citizens or the officials that they *obey* the laws in question, it does require that they act in other ways. When a law is legitimate, then, those subject to it must *uphold* it as the legitimate law of the community, and, while upholding it may at times consist in obeying it, it may instead consist in other kinds of responses similar to those just considered.[12]

Though narrow political obligation is its primary focus, this dissertation is also concerned, at times, with the question of broad political obligation. Several of the accounts offered to solve the problem of narrow political obligation do, I argue, provide ways to justify various other political duties. The principle of fairness is one example: Certain political duties will be duties of fairness that the citizen owes to her fellow citizens, duties that she has on account of her reliance on benefits provided by cooperative schemes made possible by the sacrifices of those fellows. For instance, in a community protected by a municipal system of fire protection, citizens will have a duty to pay their fair share to support that system, since they all rely on the benefits provided by such a system.[13] In this way, those accounts that may not succeed in getting us a duty to obey the law may get us other, important political duties, and this is an important result.

The primary focus, though, remains the problem of narrow political

[12] What the duty to uphold the law demands in these cases is, as Waldron puts it, "a demand for a certain sort of recognition and… respect—that *this*, for the time being, is what the community has come up with and this it should not be ignored or disparaged simply because some of us propose, when we can, to repeal it" (Waldron (1999), 100).

[13] A duty to pay one's fair share is different than a duty to uphold the law, even if what the law requires that one pay is, in fact, one's fair share. To have a duty to uphold the law is here to have a duty to pay what the law determines to be one's fair share rather than what you determine to be your fair share. The duty to pay one's fair share is prior to the question of whose determination of one's fair share one ought to abide by.

obligation. And, as I will discuss in the next chapter, this problem is a difficult one for a liberalism of freedom, for, the thought goes, it seems impossible for a person to be free if she must uphold the law, even when she disagrees with it, even when she thinks it unjust. The difficulty lies with the effect of this duty to uphold the law on the citizen's deliberations: she cannot determine for herself what she is to do because the law, as an authority, has the right to do that for her. In the next section, the task is to spell out precisely this effect of an authority's directives on the subject's deliberations.

2. Authority and Reasons

What is it to have practical authority over another? In short, to have authority over someone is to possess the right to command her, which amounts to possessing the correlative right to be obeyed by her. And so, those subject to an authority possess a duty to obey its directives.[14] On this view, authority is relevantly different from the exercise of power or force, even, according to Joseph Raz, different from the justified exercise of force.[15] What makes authority distinctive is that an exercise of authority must include, as Raz puts it, "an appeal for compliance by the person(s) subject to the authority."[16] An exercise of authority over someone, unlike a justified exercise of force against her, must include the issuing of a directive telling her what to do.

A common account of practical authority uses the metaphor of 'surrendering judgment' to make explicit what is distinctive about practical

[14] But, to be precise, a duty to obey only those directives that fall within the scope of one's authority.
[15] Raz (1986), 25. Wolff notes this difference as well. See Wolff (1998), 4.
[16] Raz (1986), 26.

authority from the perspective of the individual subject to it.[17] To acknowledge someone as an authority is, according to the metaphor, to surrender one's judgment over the relevant sphere of action: the authority gains the right to judge for you in your place.[18] But, as Raz points out, this metaphor is misleading insofar as it suggests that a duty to obey is a duty to obey mindlessly. A duty to obey, he says, requires you to surrender not the right to judge for oneself but rather the right to act on one's judgment.[19] While this latter duty still bears a heavy burden of justification, the former plausibly seems simply unjustifiable.[20] An authority, then, possesses the right to decide for you what you are to do, and it exercises this right simply by making a judgment itself: because the authority decides that you should *x*, you no longer have the ability to decide that yourself.[21] On this view, a legitimate directive of a practical authority merits deference from those subject to it: they are to act in compliance with the directive rather than on their own judgments of the circumstances in question. From the perspective of one subject to it, then, the authority's directive preempts her acting on her own judgment, and this directive's preemptive force derives, not from its particular content, but from the fact that it was issued by the authority.[22]

In *Leviathan* II.25, Hobbes characterizes authoritative directives (or what

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[17] See, for instance, Hart (1982), Raz (1979), Raz (1986), and Murphy (1999). In addition, both Philip Soper and John Gardner and Timothy Macklem endorse the basic mechanics of the Razian picture, without explicitly speaking in terms of 'surrendering judgment.' See Soper (1999) and Gardner and Macklem (2002).
[18] Hart (1982), 253-256..
[19] Raz (1986), 39.
[20] Surrendering the latter right does not even mean that you will always be unable to act on your own judgment; you will, so long as the authority refrains from exercising its right to judge in your place.
[21] Notice that you only lose this ability when the authority actually exercise its authority and makes its own determination. Were the authority to refrain from doing so, you retain your ability, at least in this case. But it remains true that whether you do or not is up to the authority's discretion.
[22] See Raz's account of justified authority in Raz (1986), 35-69.

he calls commands) in the following way: "COMMAND is where a man saith, do this, or do not this, without expecting other reason than the will of him that says it."[23] For Hobbes, what grounds a directive's status as a practical reason is the fact that it was issued by a particular person or group and represents the judgment of that particular will or group of wills. The role of an authority is to make a judgment in the place of its subjects, one that they are then obligated to follow. With regard to certain spheres of action, then, an authority has the power to replace their wills with its own, and it does this, on the standard (Razian) account, by affecting the subjects' practical deliberation: by issuing a directive, the authority creates a special kind of reason that replaces others.

The authoritative directive, then, is a distinctive kind of practical reason, distinctive because of the way it affects the practical reasoning of those to whom it applies: it excludes other reasons from their deliberations.[24] To see how this notion of excluding (or replacing) reasons makes sense of an important part of the experience of authority, we must dispense with the common metaphor of individual deliberation as 'weighing' reasons in order to discover the balance of reasons, for this metaphor suggests that all the reasons that apply in a situation are to be included in one's deliberations. Of course, once reasons are included in deliberation, some are indeed outweighed by others. But one crucial insight from this account of authority is that a reason's inclusion in an agent's deliberation does not follow simply from its presence

[23] Hobbes (1994), 165. As Wolff puts the thought, obeying a command "is a matter of doing what [the authority] tells you to do *because he tells you to do it*." (Wolff (1998), 9. Emphasis in original.)

[24] I am concerned here with justifying and not explanatory reasons. Also, I do not take a stand here on the internal vs. external reasons question; all I need be committed to here is that individuals can be mistaken about the reasons they have. I agree with Scanlon's suggestion that, once we admit this sort of claim, the remainder of the internal vs. external reasons controversy is not very important. See Scanlon (1998), 363-373, especially 372-373.

in the situation. Some reasons may be excluded from deliberation in the first place, prior to any weighing: they are such that one ought not act on their basis, and, because one ought not act on their basis, one ought not even include them in one's deliberations.[25]

When this is the case, we have what Raz calls "exclusionary reasons": second-order reasons to refrain from acting for some other, excluded reason(s).[26] For instance, a person has reasons not to give her friend financial advice with a view towards her own financial gain, for doing so is incompatible with the bonds of friendship; reasons of financial gain, then, are excluded from her deliberations about what advice to give her friend in this situation.[27] Now, it may nevertheless be ok for her to end up gaining financially as a result of the friend taking her advice, so long as she gave that advice for other reasons. The point is that, in giving the advice, she is not to act on the basis of those reasons of financial gain. Her reasons of friendship exclude these reasons from proper deliberation.

The thought behind this picture of authoritative directives as exclusionary reasons is that, when someone is a legitimate authority, there are certain objections to the performance of that person's directives that one cannot plead if the directive is to be genuinely authoritative. Suppose an arbitrator possesses the authority to decide a financial dispute between two people.[28] The main kind of objection they cannot make to her ruling is the bare objection that it is mistaken on the merits, for what the arbitrator possesses authority over is deliberation over the merits of the case. Other

[25] Among those who accept this sort of picture are Thomas Scanlon, Joseph Raz, John Gardner, Timothy Macklem and Leslie Green.
[26] Raz (1999), 35-48, 178-199. See also Gardner and Macklem (2002), 459-470.
[27] Gardner and Macklem (2002), 464-465..
[28] Raz (1986), 41-42.

objections, however, may be legitimate: that the arbitrator was drunk when she made the decision—and so her judgment impaired—or that she failed to consider certain key pieces of evidence may both be legitimate objections to her decision. What objections are legitimate will vary with the particular authority. However, that you would have judged or decided differently were it up to you is never, by itself, a legitimate objection to an authority's judgment.[29]

Suppose the arbitrator decides that you ought to pay a certain amount to the other, and this decision is a legitimate exercise of her authority and so binding. This directive, although it is binding, need not mean that you ought, all things considered, to pay the other the money, for genuinely authoritative directives may still be overridden by other reasons. A directive can be authoritative without necessarily having the final word about what you are to do. What effect, then, does the arbitrator's decision have if it does not have the final word? Consider Raz's explanation of the purported effect of the directive on your practical reason:

> In deciding whether one ought to obey the authority's directive, one ought to exclude all the reasons both for and against paying the required sum which were within the jurisdiction of the authority. One ought to weigh the directive in the balance with whatever reasons for or against the act it requires are outside the authority's jurisdiction, adding to them whatever reasons arise out of the duty to support just institutions in the situation at hand.[30]

The authority, then, has jurisdiction over a certain sphere of reasons: over those reasons, it decides and those subject to its authority do not. Once an

[29] So long, of course, as the authority's judgment is within its jurisdiction. If an authority issues directives outside its jurisdiction, those directives have no authority, and so that you would have judged differently is all you need to justify not complying with the directive.
[30] Raz (1999), 192.

authority makes a judgment, the reason provided by the judgment excludes those in the relevant sphere. Because they are excluded, objections relying on them are illegitimate. But there may be other reasons that apply in the situation but that are outside that sphere, and these reasons may override or defeat those provided by the directive.[31] Since the authority lacks jurisdiction over these other reasons, determining whether they do override the directive is for the subject to do, not the authority. And it is only when there is no legitimate objection to the directive and when no outside reasons override it that it requires action.[32]

> The following is an analysis of practical authority:
>
> *Y* is a practical authority over a sphere of reasons just in case: (1) *y*'s directives themselves are reasons for action; (2) there is no direct connection between the content of the reasons provided by *y*'s directives and the actions for which they are reasons (the 'content-independence' condition); and (3) *y*'s directives are reasons not to act for those reasons included in the sphere of reasons (the 'pre-emptiveness' condition).

Authoritative directives are, on this analysis, content-independent and pre-emptive reasons, and this is what makes them distinctive. The content-independence condition captures how 'that *y* said so' is, as Hobbes notes, the reason for one to *x*, even though 'that *y* said so' seems, as Raz puts it, an "extraneous" consideration: 'that *y* said so' could have been a reason to do a variety of actions, perhaps even not-*x*.[33] Directives are not the only kind of

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[31] And so the obligation created by a directive to φ is a prima facie obligation—it is capable of being overridden—unless the authority possesses absolute authority (that is, unless the authority is not restricted in scope but extends over all reasons that apply to one). Unless it possesses absolute authority, then, its exercise of authority does not deprive one of the ability to act on one's own final judgment about what to do, since it remains to be seen whether there are any reasons outside the authority's jurisdiction that outweigh or override the reason provided by the authority's directive.

[32] Even when outweighed though, the directive will often have the feel of a requirement, and this is largely because it still exercises its exclusionary function.

[33] Raz (1986), 35.

content-independent reason: requests also function as content-independent reasons, but they do not function as pre-emptive reasons.[34] The pre-emptiveness condition captures the point about illegitimate objections: those objections one cannot make—and so those which one cannot act on—are those based upon one's own evaluation of the reasons in the authority's sphere. Once a directive is issued, the reasons within the authority's sphere are excluded from the subject's deliberation, and it is this exclusion that gives an authoritative directive the sort of mandatory force that duties have.

When a person is subject to a legitimate practical authority, then, she is thereby deprived of what I'll call deliberative independence over a certain sphere of reasons:

> *Deliberative independence* in some situation is the possession of the right (a) to determine for oneself, in that situation, the strength of all relevant reasons, (b) to judge what one is to do on the basis of those reasons, and then (c) to act on that judgment. Complete deliberative independence is the possession of this right in all situations.

A legitimate authority has the right, within a certain sphere of reasons, to determine the strength of those reasons that apply in some situation, and then to make a judgment about what those reasons recommend or require that she do; and she is bound to accept that judgment, instead of her own, as operative in her deliberations. To that extent, then, the authority legitimately deliberates for her.

The challenge for a liberalism of freedom, then, lies in explaining how the law (or legal system) can have authority in this sense—how it can have the right to deliberate in place of its citizens—without the citizens' loss of this

[34] Raz (1986), 36-37. Or, to be more precise, requests purport to function in that way, since a particular request can fail to be a genuine content-independent reason.

right to deliberate for themselves counting as a loss of freedom. And this is difficult to explain, because possessing deliberative independence seems, at first glance, crucial to being genuinely free.

3. THE LAW'S CLAIM OF AUTHORITY

Why, though, think it important to find a solution to this problem of narrow political obligation? In other words, why would it be a problem if it turned out that there are no circumstances under which a citizen has a duty to uphold the law? The general consensus in the recent literature on the nature of law is that law claims authority in this sense over those subject to it: law claims that they have a duty to uphold it simply because it is the law.[35] And the law's claim to authority is a particularly strong one: it claims for itself the authority to determine even when citizens are covered by exceptions to any of its authoritative laws.[36] In this way, the law claims to have, for anything that it addresses, the final word on what we ought to do. We are only able to decide for ourselves, then, when the law remains silent or when the law carves out for us a sphere of freedom. For Raz and for others, all of this is given by the concept of law: no set of social rules counts as law unless it claims this authority.

That our interactions are regulated by an institution claiming this sort of authority is a problem if that institution is unable to achieve this sort of

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[35] What is meant by this idea that law as an institution can make claims? In *The Ethics of Deference*, Philip Soper explains it in the following way: "To refer to what the law claims is to refer to what any sensible individual, putting himself or herself in the position of a representative of the legal system—for example, the officials who are responsible for the implementation and enforcement of the system's directives—ought to recognize as the implicit claim that accompanies such official action. The claims of the law… are the claims (implicit or explicit) of those who accept and enforce its norms in their capacities as representatives of the legal system" (Soper (2002), 56). See also Leslie Green's discussion of what he calls "the self-image of the state" in his *The Authority of the State* (1988), 63-88.

[36] Raz (1986), 77.

authority. It certainly is a problem when the law fails to have the authority it claims—it certainly can and does fail in many situations—but the solution to this problem is to reform the laws and legal system. Or, more precisely, the solution to this problem is reform, but only on the assumption that governance by law—by a system that aspires to authority—is the appropriate kind of political governance. I suggest that justifying law as the appropriate kind of political governance requires vindicating this aspiration to authority. And, I suggest, to provide a solution to the problem of narrow political obligation just is to vindicate this aspiration.

3.1 Law and legitimacy

Since law must claim this sort of authority, it might seem that legitimate law is law whose claim to authority is successful: legitimate law is law that citizens have a duty to obey. This definition of legitimate law depends on what William Edmundson calls *the correlativity thesis*, which holds that "being a legitimate practical authority entails that one's authoritative directives create in one's subjects an enforceable duty of obedience."[37] The problem of narrow political obligation, as I have set it out, assumes the correlativity thesis and so assumes that fully legitimate law is law citizens have a duty to uphold.[38]

Tying the legitimacy of law to the presence of a duty to obey in this way, however, has seemed to some philosophers to create a problem. Rolf Sartorius characterizes the problem in the following way:

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[37] Edmundson (1998), 43. Here Edmundson calls it the strong legitimacy thesis. Simmons, for one, accepts both the denial of political obligation and the correlativity thesis; and so, as we've seen, he holds that there are, in fact, no legitimate political authorities.

[38] This standard of legitimacy is not the only standard to be used to judge states, governments and law. There are others: for example, on another standard of legitimacy for law, a law is legitimate just in case is was enacted according to the proper legislative procedures. That is meets this standard may be morally important, even if it does not meet the former standard.

> If one is skeptical of the claim that the bare fact that the law requires something may be in and of itself a good reason for doing it… one will deny the existence of political obligation and conclude forthwith that the notion of political authority is spurious as well… On the other hand, if one believes that government at least sometimes is properly viewed as more than a well-organized group of successful thugs, one will affirm the possibility of political authority and conclude forthwith that the conditions under which it is realized also constitute the foundations of political obligation.[39]

Sartorius and others, such as Robert Ladenson, want to remain skeptical of political obligation without that skepticism extending to political authority: they want to deny both that citizens can have a duty to uphold the law and that government is nothing more than a group of successful thugs.[40] Their strategy for rescuing legitimate authority from doubts about political obligation is to deny the correlativity thesis: the law can be a fully legitimate 'authority' without creating a duty of its citizens to uphold it.

Ladenson argues that, in order to be a legitimate authority, all that one need possess is a general justification-right (or liberty) to enforce coercively one's directives.[41] According to this claim—what I will call *Ladenson's Thesis*—political authority need not, to be legitimate, possess a claim-right to obedience.[42] In order to count as legitimate, then, all the law (and legal system) needs to possess is the liberty to create an economy of threats and coercion that makes it rational for citizens to conform to the law's edicts.

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[39] Sartorius (1999), 144.
[40] Sartorius' problem is a problem—and so dispensing with the correlativity thesis necessary as a solution—only because he assumes that the government can be only two things: either a legitimate authority or a group of successful thugs. But, once we realize that narrow political obligation is not the only possible moral tie citizens can have with their government (or with each other as citizens), we can see that denying that the government possesses a right to be obeyed still leaves open the question of whether citizens have the other possible moral ties and so leaves open the question of whether the government is nothing more than a group of successful thugs.
[41] Ladenson (1980), 139.
[42] Ladenson (1980), 139. Sartorius endorses Ladenson's Thesis; see Sartorius (1999), 145.

However, as Raz argues, Ladenson's picture is entirely too far from our considered picture of political authority to qualify as an account of it, primarily because the *assertion* of the citizens' duty to uphold—and so, the assertion of the authority's claim-right to obedience—is an ineliminable feature of the law's claim of authority. As Raz says,

> To test it [i.e. Ladenson's Thesis], try to imagine a situation in which the political authorities of a country do not claim that the inhabitants are bound to obey them, but in which the population does acquiesce in their rule. We are to imagine courts imprisoning people without finding them guilty of any offence; damages are ordered, but no one has a duty to pay them. The legislature never claims to impose duties of care or of contribution to common services. It merely pronounces that people who behave in certain ways will be made to suffer.[43]

Now, Ladenson's Thesis certainly describes a coherent picture of a possible sanction-based social structure. Raz's point is that, even if this sort of political system came about, we would not think that is was governed by political authorities but rather simply, perhaps, by political power. This example does, I think, give us good reason to reject Ladenson's justification-right conception of political authority as the right conception for understanding law.

However, Raz seems to intend the example to show more: he thinks that it gives us good reason to accept the claim that political authorities must at least assert the right to be obeyed.[44] We will call this claim *Raz's Claim*. Philip Soper, however, makes a good case in *The Ethics of Deference* that Raz's argument by example here does not succeed in establishing Raz's Claim, though it does give us good reason to reject Ladenson's Thesis. What Raz establishes with this example, according to Soper, is that an authority cannot

[43] Raz (1986), 27.
[44] Raz (1986), 28. To put it another way, a *de facto* authority must at least claim to be a *de jure* authority. See also Shapiro (2002), 386.

merely attach certain penalties to certain actions; instead, it must, to count as an authority, also make claims about its subjects' duties: it must claim that they have duties to do what its directives say they ought to do.[45] Raz seems to assume that the claim an authority must make here is that its subjects' have a duty to *obey*, a duty to do what it directives say to do because they say to do it. But, as Soper observes, an authority's claim that someone has duties to do what its directives say to do is not equivalent to this claim that she has a duty to obey it. The authority's claim may simply be that she has duties to do what its directives say to do because the directives accurately codify her various pre-authority duties. In this way, the law may make claims about what its citizens ought to do without making an additional claim about why they ought to do it.

Soper argues that the law does not claim that we have a duty to obey it; it claims instead (a) that it has correctly codified what it is we have pre-legal duties to do—and so, the law makes moral claims that we must do *x* and must not do *y*—and (b) that it is justified in forcing us to do fulfill these duties. In this way, the law does make claims about what we ought to do—and this is what Raz's example shows—but it does not thereby claim a right to be obeyed. Since this is all that law claims, legitimate law will simply be law that succeeds at codifying our pre-legal duties and attaching appropriate penalties to our failure to fulfill them.

3.2 Legal penalties and the law's claim of authority

One main argument for the view that the law's claim of authority is a claim to a right to be obeyed is that, without this claim, the law could not

[45] Soper (2002), 70n36, 79-80.

make a distinction between fees or taxes to be paid for the privilege of doing some *x* and fines to be paid as a penalty for doing some prohibited *x*. Unlike implementing a fee or a tax, to levy a fine is, in part, to take a stand on the impermissibility of the action in question: you cannot fine someone without claiming that what they did to merit the fine was impermissible. Soper's point, then, is that all the law need do in order levy a fine is to claim that the conduct in question is impermissible; it need not make a claim about what it is that makes it impermissible.[46] So long as the law is taken to make claims about the permissibility or impermissibility of the conduct itself, it can levy fines rather than simply attach fees, for fines, as he notes, "entail *claimed moral duties* to refrain from the conduct [in question]."[47] On Soper's account of law, then, whenever the law levies a fine, it claims merely that the action in question was one that it *advised* or *counseled* the person in question that she had a duty not to do.

However, it seems that this fact that fines entail claimed moral duties does present a problem for Soper's argument that the law does not claim a duty to be obeyed. On Soper's view, the law makes two minimal normative claims, and nothing more: "the claimed right to enforce and the claim that the norms being enforced are believed to be just—the content is believed to be correct."[48] The problem is that, despite what Soper thinks, this latter, moral claim is not always strong enough to give the threatened consequences of nonconformity with some law the status of a fine. Later, in discussing the

[46] Soper (2002), 80. On Soper's view, then, the sort of authority-claim the law is making, then, seems closer to theoretical authority about morality than practical authority in the sense discussed in Section 2 of this chapter.
[47] Soper (2002), 80.
[48] Soper (2002), 80. The second claim is the same kind of claim that any other moral agent has the standing to make, since it is simply a claim about what one thinks, after exercising moral judgment, another ought to do.

differences between moral and legal obligation, Soper remarks that legal obligations are not claims about a person's moral duties, but rather are "at most" simply ought-statements conjoined with the justified threat of coercive enforcement: the 'bindingness' of the legal obligation, then, does not derive from the kind of moral reasons on offer but rather from the law's threatened force.[49] As Soper says,

> Legal obligation shares with moral obligation the sense that prescribed actions have a moral justification; but it is *legal* obligation, rather than *moral* because the lack of option in the case of law stems from the state's claim of coercive authority, not from any claim of moral authority.[50]

What makes laws different than anyone else's statements that we ought or ought not do something, then, is that the state promises to enforce the laws.

The problem with Soper's view is that it cannot handle cases where the law, in legally requiring or prohibiting something, cannot plausibly be understood as making a claim about what you already have a duty to do, for such a claim, in these cases, would be quite implausible. Soper addresses one kind of case—cases where the law solves coordination problems by making one solution salient[51]—but what interests me are cases that neither solve coordination problems nor prohibit something that is clearly already wrong. These cases are those where the law prohibits something outright that, say, is imprudent or unwise for persons to do but not straightforwardly wrong for all persons to do (for example, wearing one's seatbelt while driving or a helmet

[49] Soper (2002), 90.
[50] Soper (2002), 90. Soper intends his view to mark a sort of middle ground between Raz's view that legal obligations purport to be moral obligations and Austin's view that legal obligations are simply threats of coercion attached to failures to do something.
[51] Soper (2002), 80-81. In short, by providing a solution to coordination problems via legislation, the state can create a duty to abide by the legislated solution, but only because the solution is a solution, not because it is a law.

while motorcycling, or purchasing health insurance for oneself); or cases where the law requires something that, say, falls in a class of actions of which I have an imperfect duty to perform some but not necessarily those that the law requires (for example, paying taxes to support various social welfare programs). If Soper is to allow that the law can levy fines in these cases, he must admit that it claims that citizens have moral duties to refrain from the conduct in question. But, in these cases, what the law prohibits is not wrong considered by itself.[52] If the law is able to levy fines in these cases but the actions are not plausibly wrong or prohibited prior to being made illegal, it seems it must be the case that the law claims to power to make them wrong by making them illegal. The law, then, claims a right to be obeyed.

The law speaks in the language of obligations and permissions. So long as we admit that there are things we ought and ought not do that we are not thereby obligated or duty-bound to do or not do, it seems that, on Soper's view, the law cannot impose fines for failure conform to laws about such things, for the law cannot command me but only advise me and I am not required to do them. But this result, I think, does not fit with our conception of the law, and it suggests that Soper is mistaken in thinking that, were the law publicly to disavow all genuine authority, no 'normative inconsistency' would emerge from the institution.[53] It seems that whether the law can fine

[52] It seems very implausible, for instance, to claim that all motorcycle riders have a moral duty to wear helmets. They may all have strong prudential reasons to wear helmets, reasons they may (foolishly) disregard, and some may have moral duties to wear them, if they are parents of young children, for instance. But surely not all of them do. The same goes for the purchase of health insurance: Wealthy single people—those who can afford whatever medical treatment they might need—surely lack moral duties to buy health insurance prior to the state legally requiring that they do so. (This will be particularly true of the citizen who is both wealthy and sickly, that is, the citizen whose medical condition costs more to treat than what she contributes to the insurance scheme.)

[53] Soper (2002), 81. In other words, were the law to disavow any claims to a right to be obeyed, this disavowal would not be inconsistent with any claims embedded in its practice prior to the disavowal.

me for my failure to wear my seatbelt does not depend on whether it determines that I am already morally required to wear it. Of course, the law can justify making it illegal for me not to wear my seatbelt by appealing to the lower rate of injuries and costly hospitalizations, but it seems that what it is doing is precisely *creating* a duty to wear it and then imposing a fine on failure to do so rather than simply advising me that I ought to wear it and then attaching a cost to my failure to do so. But, if we think that the law can require that I wear my seatbelt and thereby claim to create for me the duty to wear it, then it seems the law claims genuine authority, for the reason why I am required to wear it—and to pay a fine when I do not—is because the law says so.[54]

3.3 The law's claims and narrow political obligation

The law, then, claims to have the right to be upheld. Communities that are governed by law are communities that claim its citizens have a duty to uphold the law. This sort of claim may be mistaken, of course, and, as I will argue, it often is mistaken: the law does often fail to have the right to be upheld. The law's failure in this regard is certainly a problem; in these cases, some sort of reform is in order. Interestingly, proposed reforms never seem to be that community dispense with law in favor, say, of the system Raz envisions as embodying Ladenson's Thesis. Instead, proposed reforms concern the ways the legal system might be changed so that it achieves (or, at

[54] But what about acts that are, as legal scholars put it, *mala in se* (that is, acts that are already morally impermissible)? Soper wonders why we need the claim of authority, since such acts are already impermissible. Waldron points out, though, thate law plays an important concretizing function with regard to such acts: While there is no reasonable controversy about whether rape is wrong, there may nevertheless be reasonable controversy about certain borderline cases, such as whether having sex with a 16 year-old should count as statutory rape. The law performs an important function by making clear where those borders are for us as a society.

least, comes closer to achieving) the authority it claims. In this way, we seem committed to governance by authoritative law as a project to be pursued.

To offer a solution to the problem of narrow political obligation, I suggest, is to vindicate our commitment to this project of governance by law.[55] As Jeremy Waldron argues, there seems an "aspirational connection" between governance by law and justice: a system of coercively enforced rules is a legal system (and those rules are law) only if that system holds out the promise of justice for the community.[56] And so, to call a system of governance a *legal* system is, in part, to claim that the point of the system is to pursue justice for the community, for that is the point of law, whether or not it is successfully used for that purpose.[57] If this is right, there is a connection between the law's claim of authority and its pursuit of justice for the community: the just community will be one whose law has the authority it claims for itself. And the key to solving the problem of narrow political obligation is to show why the law, in order to fulfill fully its promise of justice for the community, must achieve the authority it claims. This is my project here.

4. The Duty to Obey the Law and the Stop Sign in the Desert

The general consensus in the recent literature on the question of political obligation seems to be that the duty to obey the law cannot be justified: the authority claimed by the law of even nearly just states is

[55] Granted, an error theory of law is possible—we must use law to govern our communities even though the law can never have the authority that it, as law, must claim—but this sort of account seems unsatisfactory and so should only be a last resort.

[56] Waldron argues that the term 'hospital' provides an analogy here: "No one understands the term 'hospital' unless he understands what hospitals are *for*. To describe one's establishment as a hospital is to hold out the promise of healing and care" (Waldron (2000), 760). As Waldron notes, it might very well turn out that the care offered is, in fact, harmful to patients; but this is compatible with its holding out the promise, so long as it held it out sincerely. While a hospital properly so called may actually be harmful (to some), it must at least aspire to provide proper care.

[57] See also Finnis (1980), 273 and Christiano (2008), 53-56.

illegitimate and shows no realistic prospect of being made legitimate.[58] My concern here is with one particularly sweeping argument for this view: the argument, first offered by M.B.E. Smith in his ""Is There a Duty to Obey the Law?", using the now classic example of the stop sign in the desert:

> You are driving along a road in the desert and you come upon an intersection with a stop sign. Both roads are straight; it is dawn; and you can clearly see that there's no one else—cars or pedestrians—around for miles. You are well rested and alert. This intersection is one you're familiar with, since it is in your neighborhood, and you are a citizen of a reasonably or nearly just state. It would be, at most, an inconvenience to stop, but there's not even a trivial risk that failing to stop will harm anyone. Do you have any reason, much less a prima facie moral duty, to obey the law and stop?[59]

Smith and others think it is fairly obvious that I do not. And this result, they think, is sufficient to close the case on political obligation, for, as Leslie Green claims, "like a universal law of nature, the thesis of [narrow] political obligation cannot withstand even a single counterexample."[60] The result from this one example, the argument goes, is all we need for the denial of the duty to obey the law, even in a nearly just state. If this argument is sound, then, my project here is over before it starts.

But this argument is not sound. The argument from the stop-sign case (and other cases like it), I argue, relies on a mistaken view of prima facie duties. We should understand the duty to obey the law as a moral principle in T.M. Scanlon's sense and, when we do, we may grant with Smith that you have no reason to stop at the intersection in the desert without thereby

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[58] Again, legitimacy only in the duty-to-obey sense discussed previously.
[59] Smith, "Is There a Duty to Obey the Law?" (1999), 94. Smith's original example is of coming upon a stop sign on a deserted street at two o'clock in the morning; in the literature, the circumstances have changed from a deserted street to an actual desert, but the core of Smith's example remains.
[60] Green (1988), 229.

endangering the claim that, in many ordinary cases at least in a mostly just state, the fact that something is the law is a reason—even a conclusive reason—for doing it. Evaluating this latter claim will require more than an appeal to cases like the stop sign in the desert.

4.1 Smith's argument

According to Smith, it is irrational for you to obey the stop sign, even when you are living in a perfectly or nearly just state. The law requires that you stop at the intersection before proceeding; but, on Smith's view, it is obvious that there is *no* reason to stop at the intersection and a variety of possible reasons to keep going.[61] And so, that the law requires that you stop at this intersection cannot be a moral reason that amounts to a prima facie duty to stop, for then this reason would show up in our judgment of the case, even if it is overridden. As Smith says, "If… my prima facie moral obligation to obey the law is of substantial moral weight, my action [of failing to stop] must have been a fairly serious instance of wrongdoing. But clearly it was not."[62] And, he thinks, it is "dubious" that the action was wrong at all. And so, Smith concludes, the fact that something is against the law or is commanded by the law is of little, if any, moral significance.

To use Smith's characterization, "to say that a person S has a prima facie obligation to do an act *x* is to say that S has a moral reason to do *x* which is such that, unless he has a reason not to do *x* that is at least as strong, S's failure to do *x* is wrong."[63] A prima facie obligation is an other-things-being-

[61] We are assuming that, in the example, you have good reason(s) to be driving along this road at this time. And whatever reason(s) you have to be driving are presumably also reasons not to stop at the stop sign.
[62] Smith (1999), 94.
[63] Smith (1999), 93

equal moral consideration: other things being equal, it would be wrong not to do *x*, but it, by itself, is normally not a conclusive moral reason to act. How do we know when we have a prima facie moral obligation? As Green puts it, "characteristically, a defeated prima-facie obligation still leaves some moral trace even in its breach."[64] And, in *Three Anarchical Fallacies*, William Edmundson seems to agree: the way to find out whether one has a prima facie duty in a situation is "to ascertain whether failure to perform [the] purported prima facie duty would leave an appropriate residue of regret or remorse, indicating the presence of moral reasons that are still operative even if, in the circumstances, they have been overridden."[65] I am going to call this *Edmundson's Test*.

On Edmundson's Test, for example, I may justifiably be late to an important lunch with my friend because of some emergency—I witnessed a traffic accident and had to call the police and stay until they got there—but I ought to apologize to my friend when I do finally arrive; and I ought to because of the moral trace left by my breach of the duty to keep one's promises. This is not a case where I did something wrong by being (quite) late: the duty to keep my promise, on the normal view, was overridden (or outweighed) by my duty to aid the accident victim. But an overridden duty is still a duty, and I recognize its force by apologizing to my friend when I finally arrive. The lesson here is supposed to be that, if there is a prima facie duty to *x*, it has *some* moral force in all relevant situations, even ones where it is ultimately outweighed/overridden.[66]

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[64] Green (1988), 252.
[65] Edmundson (1998), 11.
[66] Edmundson's test, as it stands, is not always a conclusive test of prima facie duty, even if we modify it so that the test is of *reasonable* regret or remorse (or the regret or remorse felt by the reasonable person). Suppose, for instance, that you fail to fulfill some duty to person A (say, a promise to pick A up something at the store) because you had to save A's life, and saving A's

The case of the stop sign is a particular application of Edmundson's Test: we are to locate a case where the law outlaws some act that, considered apart from its illegality, we would judge morally benign or perfectly acceptable, and then we are to ask whether the fact of illegality adds any weight to the negative-evaluation side of the scale. And, the thought goes, if we can find an instance of a law, any law, in which the fact of illegality doesn't add any (or any significant) weight to the scale, we have conclusive evidence that there is no (noteworthy) duty to obey the law. This case of the stop sign is as uncontroversial an example of the reach of the law as possible. And it seems clear that, according to Edmundson's Test, the law gives us no duty to stop at the desert intersection that would leave a moral trace should we fail to heed it and stop. And this test will give us this result no matter how just the law or legal system is. In this way, no matter how just the law or legal system, we will have no duty to obey the law.

4.2 Raz's response

In his early article "Legitimate Authority," Joseph Raz argues that it need not be irrational for you to stop at the intersection in the desert, for it may be rational for you to follow an authority—in this case in the form of standard traffic signage—*blindly*, that is, without even forming your own judgment on the merits of each situation.[67] As Raz puts it, in our thinking about authority, we are liable to forget that much of the benefit of an authority

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life precluded you from making it to the store before it closed; in this case, there will not be any residue of regret or remorse. Edmundson's test seems to assume that the duty one failed to fulfill, say, by aiding one person is a duty owed to some other person. I will assume here, for the sake of argument, that Edmundson's test does show in the stop sign case that there is no moral duty to stop. I owe this example to Nate Jezzi.

[67] It must be noted here that Raz's response, as an explanation of the rationality of abiding by traffic laws, also risks denying the possibility of a duty to abide by it. What his account can get is a duty to develop the habit of abiding by traffic laws.

is that one no longer needs to spend the time and energy forming one's own judgment; by following it blindly, one has more time and energy for more important endeavors. For example, then, "[normally,] when I arrive at a red traffic light I stop without trying to calculate whether there is, in the circumstances, any reason to stop."[68] And, according to Raz, it may be rational for me to develop this habit. Furthermore, considering the fallibility of individual judgment, one may have moral reason—maybe even a moral duty—to follow the law blindly.

As Smith has assumed in the example, there is, in fact, *no* reason to stop, and so there is, from our vantage point, *no* reason to ask whether there is reason. But, our vantage point on the situation is not, Raz points out, the vantage point of the driver in the example: "for the man in our example the question does arise; [in order to know if there is no reason] he has to discover whether there is no reason to stop. And if he has to inquire in this case, he has to inquire in many other cases."[69] The driver, on Raz's view, has sufficient reason—prudential and moral—to cultivate the habit of unthinkingly obeying standard traffic signage when he encounters them.[70] And so, in this case, his stopping at the stop sign in the desert is not irrational, for his reasons for stopping in this case consist in his reasons for cultivating the general habit to do so.[71]

But, someone might object, this argument assumes that the driver does

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[68] Raz (1979), 25.
[69] Raz (1979), 25. The driver may not think to question whether he does have reason to stop when he sees the stop sign because, for instance, he is too busy being struck by the beauty of the desert mesas on the horizon.
[70] As Raz puts it, "only when it is justified to prevent [the need to look for the applicable reasons in every situation], is it also justified to accept authority [blindly], even if once in a while this makes one look ridiculous to the gods" (Raz (1979), 25).
[71] In other words, if you were to ask him later why he stopped at the stop sign in the desert, he would rightly point to his overall habit of obeying traffic signs and signals and the reasons justifying this habit as justification for stopping in this particular instance.

not, in fact, realize as he is approaching the stop sign that he has no reason to stop. All that Raz establishes here, the objection continues, is that the driver has sufficient prudential and moral reasons not to *ask* whether there is reason to stop; he may nevertheless come to realize, even without inquiring, that he has no reason to stop.[72] And in such a case, it would be irrational for him to stop even though the law commands it.

One initial response to this objection would be to point out that we cultivate habits by performing those actions consistent with the habit: I develop the habit of obeying the traffic signage by obeying the traffic signage. And so, the response goes, my habit of obeying unthinkingly standard traffic signage cannot withstand very frequent instances of disobedience. This response, however, only goes so far, for my habit may withstand some instances of running stop signs; surely not every instance of running a stop sign endangers my rationally and morally justified habit of obedience. And so, the objection still stands.

Raz's response to the argument from the stop-sign case, then, has whittled down the class of troublesome stop-sign-in-the-desert cases to those in which (a) the driver realizes, without prior inquiry, that he has no reason to stop and (b) not stopping here is clearly not one that will exceed the threshold of contrary actions that will endanger his rationally and morally justified habit of obeying traffic laws blindly. However, since these cases are still possible, they are all we need, according to Edmundson's Test, to show that there is no general moral duty to obey the law.

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[72] For instance, he may have thought about this very problem while on his drive through the desert and so, as he approaches the stop sign, he realizes without much thought at all that, if he stops at the intersection, he will, as Raz puts it, "look ridiculous to the gods." (Raz (1979), 25)

4.3 A Scanlonian response

The duty to obey the law looks quite vulnerable to this modified stop sign case because, as Leslie Green puts it in *The Authority of the State*, "if law has content-independent force, then it has it *qua* law, and that will underwrite the obligation to obey all laws."[73] There is no reason to stop in the modified stop-sign case and so the stop sign seems to have no content-independent force as law. This result, then, is sufficient for the denial of narrow political obligation (of even a perfectly or nearly just state). Now, if Green's claim about law is correct, the same sort of claim about promises ought to be correct as well: if a promise has content-independent force, then it has it *qua* promise, and that will underwrite the prima facie duty to keep all one's promises. Edmundson's Test, then, ought to apply to the duty to keep one's promises: if there is a prima facie duty to keep one's promises, it will show up in all relevant cases, even if just as a 'moral trace' that justifies regret or remorse.

To see whether this way of thinking about promises is right, consider the following example, which I call *Promised Medicine*:

> You have a treatment-regimen of a certain medicine, and this medicine cures two very rare illnesses: one a fairly benign, short-term illness (it's mostly a nuisance and doesn't really impair one's functioning) and the other a somewhat painful, immobilizing and chronic illness. You notice that an acquaintance of yours has come down with the former illness, and, being a very robust person who's rarely ill, you promise (in the right way) to give him your supply of the drug. But then you unexpectedly come down with the latter illness, while your acquaintance has just shaken off his illness (and he now has an immunity from catching it again). You haven't yet given away the medicine, but you have promised to do so. Do you have even a prima facie duty, grounded in your promise, to give him the medicine?

It seems to me that you do not have a prima facie duty to give him the

[73] Green (1988), 229.

medicine and that the promise in this case lacks any force.[74] Were you not to keep the promise, there would be no moral trace left of the promise: you would not owe this acquaintance an apology for not keeping your promise.[75] This case, then, is relevantly analogous to the stop-sign case. The reason why you do not have a prima facie duty in Promised Medicine is that, in this case, there is no longer any point to the promise. And, for this reason, this case does *not* show that there is no general duty to keep one's promises. It seems to me that the same thing holds for the stop-sign case and the duty to obey the law: you do not have a prima facie duty to stop at the intersection because there is no point to the stop sign in those circumstances.

T.M. Scanlon's account in *What We Owe to Each Other* of the relationship between principles of obligation and reasons can explain this claim. Principles of obligation, on Scanlon's view, are "general conclusions about the status of various kinds of reasons for action."[76] As a *general* conclusion, a valid principle will rule out certain actions by ruling out (or excluding) the reasons for them, but it will "also leave wide room for interpretation and judgment."[77] Principles, then, may admit of exceptions in those situations where the reasons grounding the principle are not (or are not the only ones) present. When there are additional reasons or when some reasons that ground the principle are absent, whether the principle still gives the right answer is a matter of

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[74] If you do not agree, I expect that the example can be modified accordingly.
[75] You ought to explain to him why you are not giving him the medicine, if you have the chance, mainly because your failure to give it to him will go against his expectations and it is common courtesy; but, once you've explained it to him, there is no 'moral trace' left of the promise that gives rise to a need to apologize. That you ought to explain why you are not giving the medicine to him is not evidence of a moral trace left by the promise, for you would have the same reasons of common courtesy to explain why even if you hadn't promised to give it to him but you knew that he was expecting you to do so.
[76] Scanlon (1998), 199.
[77] Scanlon (1998), 199.

judgment.[78]

It is commonly accepted that we need not keep a promise no matter what. But the standard account regards the cases of not keeping promises as cases in which the interests of the promisor (or some third party) outweigh the promise-created bulwark that protects the interests of the promisee. Now the 'interpretation and judgment' that Scanlon speaks of regarding principles of obligation can simply be the weighing of competing concerns, as the standard account of promising supposes. But Scanlon argues that the metaphor of balancing, and the picture that depends on it, is misleading "insofar as it suggests that what is involved is only a process of weighing or comparing the seriousness of conflicting interests"[79]:

> The costs at stake for promisor and promisee are of course among the relevant factors in deciding whether a given promise must be kept, but these must be considered within a more complex structure which the metaphor of balancing conceals. [80]

A principle, then, is not a general claim based simply upon the weight of various competing interests in normal cases but rather one based upon the consideration of a variety of reasons, including but not limited to the interests at play, from among a complex set of them. In judging whether to keep a promise (or even whether a promise possesses any force in the situation), simply weighing competing interests is inadequate.

The complex structure that Scanlon finds in promising is the kind of structure that Raz discusses in his work the role of rules on practical

[78] This, I take it, is why Scanlon argues that every principle admits an 'absent special justification' condition.
[79] Scanlon (1998), 200.
[80] Scanlon (1998), 200.

reasoning[81] and on the notion of a protected reason.[82] A protected reason is both a reason for some action and an exclusionary reason, that is, a second-order reason for excluding various other reasons from one's deliberations.[83] What is important here about protected reasons is that the excluded reasons are not outweighed by other reasons in one's deliberations but rather excluded from one's deliberations even before any weighing is done. Consider now Scanlon's explanation of the complex structure of promising:

> Anyone who understands the point of promising—what it is supposed to ensure and what it is to protect us against—will see that certain reasons for going back on a promise could not be allowed without rendering promises pointless, while other exceptions must be allowed if the practice is not to be unbearably costly.[84]

In saying that certain reasons could not be allowed, Scanlon does not mean that these reasons are not admitted as justifying exceptions because they are always outweighed. He means rather that certain reasons are not to be admitted at all in one's deliberations: they are to be excluded.

Scanlon mentions two instances: inconvenience and large but foreseen costs.[85] That fulfilling some promise would be an inconvenience for me does count as a reason against the action that would fulfill the promise, but it is a reason excluded by the promise. And so, even if my failure to fulfill my promise would be only an inconvenience for the promisee, and a slightly

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[81] For instance, Raz says about rules that "usually each rule is based on a number of reasons, and they reflect a judgment that those reasons defeat, within the scope of the rule, various, though not necessarily all, conflicting reasons" (Raz (1999), 187). Rules, then, are general conclusions in much the same way as Scanlonian principles are. And, for Raz, it is with regard to rules that "talk of exceptions comes into its own" (Raz (1999), 187).
[82] Raz (1999), 191.
[83] It is this exclusionary aspect of a protected reason, for instance, that gives duties and obligations their force.
[84] Scanlon (1998), 200.
[85] Scanlon (1998), 200.

smaller one than the inconvenience to me of fulfilling it, I still ought to fulfill my promise, for the inconvenience to me simply is not put on the scale. Similarly, that fulfilling some promise would carry certain large but foreseen (or clearly foreseeable) costs, though a reason counting against the action, is excluded by the promise. Whether such large costs (or the risk of them) are foreseen or clearly foreseeable by the promisor matters because of the point of promise-making.[86] For Scanlon, the point of the principle of fidelity to promises is the value of the kind of assurance promising provides, for instance, to one's planning and decision-making.[87] If inconveniences or large but foreseen costs were allowed as reasons counting against fulfilling promises, that someone has promised to do something for you would not be able to provide the kind of assurance that would justify relying on that person to do what he promised. This kind assurance, for Scanlon, is that of "being able to be reasonably certain that a thing will happen unless one consents to its not happening."[88]

The important point here is that exceptions to the principle that one ought to keep one's promises—a principle that is standardly referred to as a *prima facie* duty—need not simply be exceptions based simply on the balance of competing interests (although such balancing will be part of it). In Promised Medicine, there is no interest of the promisee at stake, and so nothing that needs to be protected by the kind of assurance promising provides; in this way, the promise has no point. When interests to be are weighed against each other, there will be a 'moral trace' that justifies an

[86] This is true as well for the point about inconveniences.
[87] This is not the only way that assurance is valuable. See Scanlon's example of Harold (Scanlon (1998), 303).
[88] Scanlon (1998), 316. It is *reasonable* certainty because one cannot rule out the possibility that keeping the promise would impose large and unforeseeable costs on the promisor.

apology for not keeping the promise.[89] But there are other exceptions to the principle that one ought to keep one's promises that do not involve weighing competing interests and so do not result in any 'moral trace.' Applying Edmundson's Test to cases involving these other exceptions—such as Promised Medicine—gets the mistaken result that there is no general duty to keep one's promises.

And now back to the duty to obey the law.[90] What is the point of the law? Crudely put, the law is a social institution whose purpose is to govern the interactions of citizens with each other such that, by obeying the law, they interact in ways consistent with the demands of justice or mutual respect.[91] What is unusual (and troublesome) about both the original and the modified stop sign cases is that the stop sign is in the desert with nary another person around. In these cases, obeying this particular traffic law has nothing to do with treating one's fellow citizens justly or with respect, for there are none around. In this instance, this traffic law has no point. Traffic regulation has a point, say, in the circumstances of traffic, and it is only in these circumstances that one could have a duty to obey the traffic law.[92] And so, if what I have said about the duty to keep one's promises is right, then, the fact that there is no reason to stop at this stop sign in the desert is not, by itself, sufficient for denying that there is a general duty, absent special justification, to obey the

[89] Suppose, for instance, that in the example your acquaintance was still ill and so his interest in being cured both competes with yours and gives your promise some value to him as assurance.
[90] On Edmundson's view of the matter, "discussion of the stop sign in the desert case leads to a depressing impasse" (Edmundson (1998), 27). Either, he thinks, one intuits a prima facie duty to obey the law in this case, or one does not. And, he suggests, this difference is a dispute that we cannot adjudicate, since it is a dispute about intuitions. I do not share his pessimism.
[91] Their interactions both simply as citizens and in their roles as public officials.
[92] These include that the roadways are public and populated by drivers and that drivers possess limited information about the behavior and intentions of the other drivers around them.

law.

One might object by arguing that, unlike the duty to keep promises, the traffic law is to be followed only because doing so is instrumental towards fulfilling our moral duty not to endanger others: I need not obey the traffic law because it is the law; rather, I need only to conform to it because, by doing so, I can get around without (excessively) endangering the lives of others.[93] As A. John Simmons notes, traffic laws are "the best examples" of cases in which "some laws establish ways of doing things consistently, where inconsistency would be undesirable… [and] because of the legally created practice… we have good reason to obey the law, since disobedience endangers both self and others."[94] And so, on this objection, it is not that the law directs you to act in this way but rather that everyone else is acting in this way in the circumstances of traffic that grounds a duty to so act in those circumstances.[95]

But the duty to follow traffic law does not apply, when it does, only because it is instrumentally valuable as a way to get around without endangering the lives of others. That explanation is too simple. The *way* that the traffic law regulates traffic matters as well, for the law can effectively regulate traffic but in ways that disrespect some citizens. We can imagine, for instance, a system of traffic regulation governed, in part, by considerations of race: in this system, for instance, whites are automatically given preference

[93] The distinction between obeying (or complying) and conforming is Raz's (I think). To comply with the law is both to act in accordance with the law and to do so *because* the law commands it. To conform to the law is simply to act in accordance with it and to do so not because the law commands it but for other reasons.
[94] Simmons (1979), 194. Here, then, Simmons argues that obeying the traffic law is justified, when it is, because it is instrumentally valuable, both prudentially and morally. The law simply functions as a coordinating mechanism.
[95] Smith seems to think that it is generally true that a duty to obey the law adds little to questions of how we ought to act. As he argues, "there is certainly nothing lost by doing this [i.e., dispensing with the duty to obey the law], for we shall not thereby recommend or tolerate any conduct that is seriously wrong, nor shall we fail to recommend any course of action that is seriously obligatory" (Smith (1999), 95).

over blacks at intersections with four-way stops.[96] Such a system, once in place, may be as instrumentally valuable a solution to the problem of traffic as the standard system assumed in the case of the stop sign in the desert. But this does not mean that we ought to be indifferent between them, for we have reason to choose the latter over the former: the racism of the latter system offends against the duty of mutual respect while the egalitarianism of the former system does not. In the circumstances of traffic, the latter system is, in this way, an intrinsically valuable system of traffic regulation to have in place (because it is a *way* of showing others respect). And so, we can have more than instrumental reasons for abiding by even the traffic laws.[97]

5. Conclusion

The mistake of the argument from the stop-sign case rests, in the end, on the narrow focus on the duty to obey the law, for this focus too easily recommends a strictly instrumental account of the force of the law. As I discussed in Section 2, there is a broader conception of political obligation that includes both active political duties and duties of compliance, and aiming for such a conception may make available a justification of duties of compliance, including a duty to obey the law, that is relevantly different from an account offered by a conception concerned solely with the duty to obey.[98] And that is because, with this broader focus, the point of governance by law—and so of governance by authority—becomes clear.

Now, as Green notes, in an account concerned with all the political

[96] I think it is possible to design an effective system that codifies this sort of preference: for instance, whites are to drive white cars and blacks black ones.
[97] These other reasons to abide by traffic laws, like the instrumental ones, are not in play in the stop-sign case and so, even when we admit them as reasons to abide by traffic laws, they are not reasons to stop in this case.
[98] Because, with this broader focus, the point of governance by law becomes clear.

duties together—or, as he puts it, "in a context of active participation regarded as a moral duty"—"the nature of the state's requirements will be seen in a different light; they will be self-imposed laws."[99] 'Self-imposition' of the law does not consist in the citizen imposing those laws on herself nor even in her merely agreeing with all the laws on the books. Self-imposition, I suggest, consists in the community imposing the laws on itself (and so on its members) as good-faith answers to questions concerning rights, justice and the common good. It is precisely in providing community-wide answers to questions of rights, justice and the common good that governance by law finds its point. As I argue in Chapter IV, authoritative resolution of reasonable disagreement among citizens about these questions is necessary if citizens are to be able to exercise their own freedom while at the same time fully respecting the equal freedom of their fellows. The project of governance by (authoritative) law, then, is to establish a system of equal freedom for all citizens in circumstances of reasonable disagreement. And so, it is only when particular laws contribute to this project that they can possess the sort of authority law claims to possess. The stop-sign in the desert does not have authority as law, even in a nearly just state, because it does not contribute to this project.

[99] Green (1988), 223.

II. CONSENT, OBEDIENCE AND FREEDOM

Liberalisms of freedom confront this version of the problem of narrow political obligation: Under what circumstances, if any, can a citizen be subject to the authority of law and yet still free? The difficulty lies in explaining how the citizen's loss of deliberative independence—a loss that comes with subjection to authority—need not count as a loss of freedom. One such explanation, which is the focus of this chapter, holds that a person's subjection to authority (and so, a citizen's subjection to law) does not count as a loss of freedom just in case that person has freely consented to the subjection. This consent account of political authority and obligation poses an important challenge for a liberalism of freedom, for it holds that law can only have the authority it claims over a citizen if that citizen has herself given it that authority via her own consent. On this account, proper respect for the value of individual freedom requires leaving it up to each citizen whether to allow law the authority it claims over that citizen.

Consent theory is powerful, in large part, because it takes seriously the threat that subjection to the authority of another seems to pose to freedom as self-determination: The right of another to replace your judgment of what you ought to do with her judgment seems simply incompatible with your being self-determining. This chapter is concerned to understand the consent account of political authority and obligation. But it begins, not with the consent account, but rather with Robert Paul Wolff's well-known argument that, because of how authority purports to affect its subjects' deliberations, there can be no legitimate political authorities, for being subject to an authority is necessarily incompatible with a person's status as a free (or self-determining) person. On Wolff's view, then, problem of narrow political obligation is

insoluble for a liberalism of freedom. While this is mistaken, the particular concerns about freedom and authority that motivate Wolff's argument are the right sorts of concerns for a liberalism of freedom.

As for consent accounts, this chapter considers the sophisticated version of such an account that A. John Simmons has developed in a number of works. In this chapter, the goal is to summarize Simmons' account as charitably as possible for it is the strongest consent account of political obligation to which to respond. In the course of considering Simmons' account, this chapter defends it as the right sort of consent account against two rival consent accounts that claim to find many more people with a consent-based duty to obey the law than Simmons' account does. Simmons' account, unlike the others, remains faithful to the underlying rationale behind resorting to consent. The challenge for a liberalism of freedom, as I see it, is to develop an alternative to Simmons' consent account that still respects the value of individual freedom.

1. WOLFF ON THE IMPOSSIBILITY OF AUTHORITY

That an authority has the power to deliberate in place of those subject to it is what worries Robert Paul Wolff, for he claims that the subject's loss of deliberative independence is an objectionable (and ultimately unjustifiable) loss of freedom. This claim forms the core of his rejection in *In Defense of Anarchism* of even the possibility of legitimate political authority. I agree with many others that Wolff's argument against the possibility of legitimate authority is mistaken, but I find his focus on the problem of the compatibility of individual freedom and subjection to authority to be the right kind of focus, for this problem is one that any "liberalism of freedom" must address.

Wolff's argument relies on a version of what I'll call 'the freedom constraint' on the legitimacy of practical authority. The freedom constraint captures the main criterion that a liberalism of freedom requires of an account of political obligation.

> *The Freedom Constraint:* A purported practical authority is legitimate—it actually has the authority it purports to have—only if those subject to it lack any freedom-based complaints against the duty to obey its directives. A freedom-based complaint is a genuine claim that their obedience is incompatible with their status as free persons.

The freedom constraint, I think, specifies a quite plausible necessary condition for the legitimacy of an authority, particularly since what has worried many about authority is its effect on the freedom of those subject to it. Any successful account of legitimate political authority will have to satisfy this constraint. But, in these terms, Wolff's mistake is the claim that practical authority, by definition, fails to satisfy the freedom constraint.

A. John Simmons also accepts something like the freedom constraint, and he argues, more plausibly, that authorities can satisfy it, but only those (few) authorities whose subjects have consented to their subjection. On Simmons' view, when an authority does not have its subjects' consent, those subjects have a freedom-based complaint—"The authority is imposed on us"—against its claim to govern them. The difference between Simmons' and Wolff's views about the possibility of legitimate authority depends on their different understandings of freedom; and the ways in which Simmons' view is more plausible, I'll argue, point to the general way in which subjection to an authority can be compatible with freedom: subjection to an authority can actually be in service of a person's freedom, and so, when it is, she will lack any freedom-based complaint against that subjection.

1.1 Wolff's argument

What Wolff finds objectionable about practical authority is that, on his view, obeying a command is incompatible with being free (or autonomous):

> The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled. It would seem, then, that there can be no resolution of the conflict between autonomy of the person and the putative authority of the state.[1]

On Wolff's view, then, fulfilling one's primary duty to be autonomous—and so, actually being autonomous—precludes standing in the relationship of obedience to a political authority that is necessary for it to be legitimate.[2]

But why is it the case that to be autonomous (or free) is, in part, to refuse to obey any purported authority? For Wolff, what marks someone as autonomous is not merely that she is a responsible agent but that she is one who *takes* responsibility for her actions.[3] And, he says, "taking responsibility for one's actions means making the final decisions about what one should do."[4] Wolff, then, does not subscribe to a purely negative account of freedom—say, freedom as merely non-interference—but rather to a partly positive account, to freedom as, in part, self-determination. And, importantly, to be free is not simply to possess a certain capacity—a capacity to take responsibility for one's actions—but is rather to exercise that capacity; to borrow language from Charles Taylor, freedom, for Wolff, is an exercise-concept.

Now, taken by itself, Wolff's claim that freedom is taking responsibility

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[1] Wolff (1998), 18.
[2] That Wolff argues (implausibly) that we have a primary duty to be autonomous does not matter for his basic objection to authority, since the objection is that authority is incompatible with the duty to be autonomous because it is incompatible with being autonomous, and this latter incompatibility is a problem whether or not persons have a duty to be autonomous.
[3] Wolff (1998), 12.
[4] Wolff (1998), 15.

for one's actions may suggest that freedom is compatible with submission to an authority, for I may decide (and take responsibility for deciding) to obey the authority's directive to φ, a decision that is the final one about what I should do. But this cannot be what Wolff means by 'final decision,' because he argues that, for the autonomous person, "there is no such thing, strictly speaking, as a command," or, in other words, no such thing as a content-independent, preemptive reason.[5]

Wolff does not mean that someone's issuing of a purported command will never affect the reasons I have—it may even affect them in such a way as to give me a duty to do what it says—for a purported command can affect them in ways compatible with it still failing to be a legitimate command:

> If someone in my environment is issuing what are intended as commands, and if he or others expect those commands to be obeyed, that fact will be taken account of in my deliberations. […] For example, if I am on a sinking ship and the captain is giving orders for manning the lifeboats, and if everyone else is obeying the captain *because he is the captain*, I may decide that under the circumstances I had better do what he says, since the confusion caused by disobeying him would be generally harmful. But insofar as I make such a decision, I am not *obeying his command*.[6]

In this case, I do have a duty to do what the captain orders, but this duty does not derive from the captain's authority, for he has none, but rather from the fact that the others are doing what he orders. Basically, by obeying, they are coordinating themselves, and it is this fact of coordination that makes it wrong of me not to go along with what the captain says. In this case, though, the final decision about what I am to do remains with me: this fact of coordination that forms the basis for the duty is just one more reason added to all the others

[5] Wolff (1998), 15.
[6] Wolff (1998), 16.

about which I am to deliberate.

A purported authority's command to φ can also count as good advice, indicating that there are likely to be good reasons to φ that I should find upon deliberating. What a purported authority cannot do by issuing a command to φ, Wolff argues, is remove the decision of whether or not to φ from me. However, removing this decision is exactly what a purported authority's command that I φ is supposed to do *qua* command: it is no longer up to me to decide, as a result of my own deliberations, whether or not to φ, for the authority has decided for me.

An authority's 'right to rule,' then, is a right to make decisions for those subject to it about what they ought to do. It is this right to make decisions for another that Wolff, with his concern about individual freedom, finds objectionable about authority. As Scott Shapiro puts Wolff's basic objection in his "Authority,"

> Authority and autonomy clash not simply because one who obeys does not deliberate. The problem is also that such a person believes that the fact that he was ordered to act in a certain way gives him a reason to so act. He takes the will of another as his reason […] rather than the merits of the case at hand.[7]

The content of the reason that a command purports to create consists in both the authority's judgment and, crucially, that it is the authority's judgment, and what the reason preempts is the person's judgment. Wolff's view, then, amounts to the denial that there are content-independent preemptive reasons, for what such reasons do is block the person's deliberations, depriving her of the standing to decide for herself, and in so doing depriving her of some of her freedom.

[7] Shapiro (2002), 389-390.

Wolff's view relies on a certain understanding of freedom: to be free is to possess complete deliberative independence. Others may create first-order reasons that I must add to the others in my deliberations, but I possess the right to determine the strength of the all the relevant reasons, to judge what they together recommend or require, and then to act on that judgment. To give up any of that independence would be to give up a portion of my freedom. And so, for Wolff, a person always has a freedom-based complaint against a purported duty to obey an authority's command: to obey would, by definition, be to surrender some portion of my deliberative independence and so my freedom, something I cannot be required to do.[8]

1.2 Freedom and promising

However, if freedom does require deliberative independence, then it seems we must reject not only practical authority as incompatible with freedom but binding promises as well, since, by promising, one surrenders a portion of one's deliberative independence to the promisee.[9] In other words, to deny the possibility of content independent pre-emptive reasons requires saying that the purported reason 'that φ-ing is the fulfillment of a promise' cannot function as a reason that (normally) binds the person to φ. For, when it is a reason for φ-ing at some time, it is a content-independent reason that preempts acting on one's own (current) judgment of the first-order reasons for and against φ-ing.

In a standard case of promising, the reminder, 'But you promised to φ,'

[8] Wolff's position is an a priori anarchist one because his account asks "Under what conditions can a state (understood normatively) exist?" and answers with something like 'Under no conditions at all' (Wolff (1998), 23). He likens his account to that of a Kantian deduction, since it is an inquiry into the legitimacy of the concept of state authority, and to demonstrate that it is legitimate is to demonstrate "by an *a priori* argument that there can be forms of human community in which some men have a moral right to rule" (Wolff (1998), 23).

[9] Leslie Green notes this consequence of Wolff's view. See Green (1988), 34.

should be sufficient to prompt you to do whatever it was you promised, whether or not you judge then that the first-order reasons recommend (or require) φ-ing, and that is because the fact of the promise is a pre-emptive reason. Those first-order reasons for and against φ-ing were the ones that you took (or should have tried to take) into account when deciding whether to promise to φ; once you made the promise, this new reason replaces those first-order reasons, and in this way the promise preempts acting on those reasons.[10] And this reason—'you promised to φ'—is content-independent: there is no direct connection between the content of this reason and the action—φ-ing—for which it is a reason.[11] In this way, to promise to φ is to create a content-independent preemptive reason for φ-ing, something Wolff is committed to claiming is incompatible with the freedom of the person to whom it applies.

That promising consists in creating content-independent preemptive reasons is quite important, for a promise's preemptive character explains how it is others may rely on us, within a certain range of situations, to do what we have promised to do: what we have reason to do no longer depends on our judgment of the relevant reasons nor even on the continued presence of those reasons (up to a certain point, of course). But this reliance of the promisee requires, on the part of the promisor, the kind of surrender of deliberative independence that worries Wolff with regard to authority: in normal situations, the promisee has the right to decide for the promisor, for he has the power to hold the promisor to or release her from the promise.

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[10] Raz develops an account of promising in which promises are pre-emptive, content independent reasons to act in "Promises and Obligations" (Raz (1977)). As I argued in Chapter I, though, promises are only pre-emptive, content independent reasons so long as there remains a point to the promise; once it loses any point, it loses its status as such a reason.

[11] As Raz explains content-independence, 'that you promised to' would be just as much a reason for a wide variety of actions, perhaps even not φ-ing. See Raz (1986), 35.

Granted, the person to whom the reason applies—the promisor—is also the one who creates this reason, and so promising is in this way different from being commanded. However, they must be relevantly the same for Wolff: the promisee comes to have the power to decide whether or not φ-ing is required of the promisor and, to that extent, the promisor is deprived of a portion of her deliberative independence. On Wolff's view of the free person, the promisee's possession of this power must be incompatible with the promisor's freedom, for, when held to the promise, the promisor cannot deliberate for herself by appeal to the merits of the situation at hand about what she should do.

It seems to me, then, that it cannot be the case that complete deliberative independence is required for freedom, for, if it were, we would be forced to say that, by promising, the person sacrifices some of her freedom. Granted, we would not necessarily also be forced to say that she was not justified in making the promise—perhaps the benefits of making the promise compensates for the sacrifice of freedom—but we would be forced to say that her forfeiture of some of her freedom in making the promise is regrettable, that she paid some moral cost in making the promise. And it is not clear at all that we ought to say even that for some promises.

Consider a case in which one friend promises the other to help him learn his lines before an upcoming audition for a part he is quite excited about. Helping a friend in this sort of case is the kind of thing a person rightly finds that she has good reasons to do. But so is offering him the prior assurance that she will help him when he needs it, and promising is exactly the tool the friend needs in order to give the other that assurance, for this assurance is provided by the friend's (limited) surrender of her deliberative independence.

And it would be quite odd if the very thing that makes promising in this case a valuable expression of the bonds of friendship were at the same time a regrettable loss of freedom (as opposed to a desirable loss of independence).

What this example suggests, then, is that, while deliberative independence may sometimes be very important for freedom—being deliberatively independent can give one the opportunity to be self-determining and so free—it is not always required for freedom and indeed may be freely surrendered. And so, we can be free even when we lack some sphere of deliberative independence, and so the Wolffian version of the freedom constraint must be rejected. Wolff's argument against legitimate practical authority, then, fails: that being subject to an authority entails that one is without certain spheres of deliberative independence does not thereby entail that one is, to that extent, unfree.

2. Simmons on the Possibility of Authority

Unlike Wolff, A. John Simmons allows that a person can make binding promises and other commitments without thereby sacrificing her freedom; indeed, he thinks that the possession of this power to bind oneself via promises is required for someone to be a fully free person. On Simmons' view of legitimate practical authority, a purported authority only satisfies the freedom constraint when those people it claims to govern have consented to its authority (or, in other words, when they have promised to obey). In this way, Simmons' view takes the account of why the free person much have the power to make binding promises and applies it to the circumstances of citizenship in a state: a person's subjection to the authority of law satisfies the freedom constraint just in case she has consented to the surrender of those

portions of her deliberative independence, for this surrender via consent counts as properly under the agent's control and so as an expression of her freedom. First presented in his *Moral Principles and Political Obligation*, Simmons goes on to develop and defend his consent account in many subsequent works, including *The Lockean Theory of Rights*, *On the Edge of Anarchy*, and several of the essays collected in *Justification and Legitimacy*.

Simmons' consent theory of political obligation, which he labels 'political voluntarism,' holds that a person possesses any political duties—those duties contained in broad political obligation, including political obligation itself—only when she has consented to those duties and only because she has so consented to them. As he says, "political relationships among persons are morally legitimate only when they are the product of voluntary, morally significant acts by all parties."[12] Or, as he puts it elsewhere, "the political obligations of citizens can be grounded only in the voluntary transfer of rights from citizen to government."[13] Individual consent, he argues, is the only thing that can do the particularizing work required for political duties in a way that is consistent with (because it is an expression of) the person's freedom. A citizen only has narrow political obligation—a duty to obey the law—when she has consented to the state's possession of authority over her.[14] And so, on Simmons' consent theory, free persons can come to have a duty to obey the law of their state. However, since they can only have such a duty if they have consented to have it, there will not be more than a

[12] Simmons (1993), 36. This passage seems to indicate that Simmons does not restrict the consent-requirement to political obligation but rather thinks it holds of all political duties.
[13] Simmons (1981), 19. This passage is a bit more ambiguous, though, insofar as the transfer of *any* rights and not just the transfer of the right to command constitutive of authority requires consent, it does seem to show that Simmons thinks consent is required for any political duties.
[14] As Simmons' puts it, "Political allegiance is to be a matter for each person's decision, for each is naturally fee, with strong rights of self-government' (Simmons (1993), 228).

few people, even in states "remotely like our own," who possess such a duty to obey.

2.1 What is consent?

Simmons means something quite specific by 'consent.' Though Simmons himself does not explain it in quite this way, we can explain the kind of consent at issue here in the following way:

> To consent is to attempt to bring about a normative change in the distribution of rights and duties by some act that is:
> (1) an expression of the consenter's intention to accomplish such a change;
> (2) done in the belief that it is this expression of the intention that accomplishes this change; and
> (3) done in the belief that this expression will be understood by its observers to be of this character.[15]

This captures not only Simmons' understanding of consent but also, I think, the core, 'contractual' notion of consent.[16] Consent, in this core sense, is an act that only accomplishes what the consenter intends because it is a publicly performed and acknowledged transaction between two parties.[17]

Consent in this sense is only possible, of course, when the would-be consenter already possesses rights and/or duties to transfer. There must, then, be a background in which persons possess rights and duties not on the basis of consent, for without that background the transfer of rights by consent could not get going. To be a 'voluntarist' about some obligations, then, is to be

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[15] This formulation of consent is indebted to Raz's formulation in *The Morality of Freedom*. See Raz (1986), 82-88, especially 83.

[16] As understood here, a person consents when she *attempts* to bring about a normative change; a person, then, can consent to some rights-transfer without that consent accomplishing this transfer. Whether she succeeds in accomplishing some rights-transfer by consenting to it is an additional question.

[17] The transfer of one's own rights to another is the standard kind of normative change accomplished by consent. Other normative changes are possible, such as when I consent to an operation.

a non-voluntarist about other duties, as Simmons himself acknowledges: there is a framework of natural rights and duties that every person *qua* person possesses prior to any action on anyone's part.[18] Additionally, Simmons admits that persons can find themselves in nonvoluntary contingent relationships that give rise to duties: for example, the mere receipt of benefits from another may create a benefactor-beneficiary relationship that gives rise to a duty of gratitude.[19] Properly understood, then, Simmons' voluntarism does not apply to all rights and duties—it is not global—but only to those rights and duties arising out of certain contingent relationships, only one of which is citizenship.

2.2 Natural rights and duties

Simmons describes his view about natural rights and duties as 'Lockean': all persons, when they become fully moral agents, "begin their moral lives (upon rising to the status of full moral agents) with a substantial body of moral rights and duties."[20] These rights and duties include, for instance, a right to life, a right to own property and a duty of beneficence. These rights, Simmons argues,

> are simply specific instantiations of the overarching natural and 'equal rights of all men to be free.' […] We all have (in the logical, prerelational sense) an equal right to freedom from harm and interference by others, provided only that our actions stay within the bounds of natural law. We are morally free (enjoy a protected liberty) to do our duty and to pursue our own nonobligatory plans and projects. We are born 'with a title to perfect freedom.'[21]

As Simmons notes, we can refer to this 'perfect freedom' as either a set of

[18] Simmons (1979), 62-64.
[19] Simmons (1992), 87-88.
[20] Simmons (2001), vii.
[21] Simmons (1992), 85.

rights or, following H.L.A. Hart, as one large right.[22] If we go the latter route, Simmons says, the right is best understood as "the right of self-government."[23] This right, he says, includes

> the right to do our duty (our equal mandatory rights), the right to pursue our nonobligatory ends (our equal optional rights), and the powers to make special rights (e.g., in property or by contract) that are important for our freedom of action.[24]

These natural moral rights and duties, it seems, can be understood as together providing for each person a fully adequate scheme of freedom consistent with every person's scheme being equal. And so, what we owe each other is that we fulfill our natural duties towards them (including that we respect their rights), for we fully respect them as free agents by doing so. And, provided that we do this, we may act as we wish in what Simmons sometimes calls "the zone of indifference."

It is important to note that Simmons cannot mean by this broad right of self-government merely a right that one's exercise of self-government (or choice) not be interfered with or a right that one simply be left alone; such a purely negative conception of freedom lacks the resources to explain why persons possess those 'positive' natural duties—for examples, the duty of rescue or the duty of beneficence—that Simmons' view claims they possess. The broad right of self-government is better understood, I think, as a right to self-determination or something close to it, something like a right of authorship over one's own life.[25] This 'positive' conception of freedom does, I

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[22] See Hart (1955).
[23] Simmons (1992), 85. See also Simmons (2001), vii, and Simmons (1993), 158, 268.
[24] Simmons (1992), 85.
[25] Freedom includes an active component of self-determination, of abiding by one's own will. As Raz puts it, free agents are those who "can shape their life and determine its course. They are not merely rational agents who can choose between options after evaluating relevant information, but agents who can in addition adopt personal projects, develop relationships,

think, give us the resources when developed to derive a natural duty of rescue or beneficence, for such duties, when properly specified, protect or promote everyone's equal freedom as self-determination.

It is also important to note that this natural freedom is, for Simmons, *prepolitical*: the rights and duties constituting one's natural freedom are specifiable without any reference to the presence of political institutions and, most importantly, each person is capable of fulfilling her duties and acting within the bounds of her own rights—that is, she is capable of respecting everyone else's freedom while exercising her own—whether or not she is a member of a political community. On Simmons' view, then, possessing and discharging political duties is not required for a person to be able fully to respect others' freedom. Of course, this claim that political duties are morally optional does not imply that a person cannot come to be a citizen and so come to have political duties, for there may be other reasons for her to want citizenship, but it does become very important that she comes to have them in a way that is consistent with her freedom.

2.3 Consent and political authority

Simmons' argument that consent is the only basis for any of the duties of broad political obligation, including the narrow political obligation, depends on these duties being optional in precisely this way. Subjection to political authority must be optional, for otherwise everyone's equal right to freedom might justify finding an authority legitimate, whether or not one has consented to it, when the operation of that authority is required to protect or

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and accept commitments to causes, through which their personal integrity and sense of dignity and self-respect are made concrete. In a word, [they] are part creators of their own moral world" (Raz (1986), 154).

guarantee others' freedom. In such a case, the duty to obey a political authority would be grounded in the (natural) duty to respect others' equal right to freedom.[26]

Consider Simmons' response to this sort of natural duty account of the duty to obey, for it reveals the connection between the claims that political obligation is optional and that it must be voluntarily assumed:

> Others act wrongly if they act in ways that limit our natural freedom to dispose of our rights as God's law or our own wills dictate. Others cannot acquire authority over us by wrongly making it difficult or impossible to reject that authority without disadvantaging them. Indeed, others may only permissibly form a society among themselves (without me) provided that their doing so does not harm me in my freedom.[27]

In other words, if others find it advantageous to submit to some political authority, they are free to do so, but only so long as their submission to that authority respects my rights, including, importantly, my right to fulfill my duties towards them. My ability to discharge my duties towards them cannot be affected by any normative change they make—permissibly or impermissibly—among themselves without me. And so, I will be able to discharge fully my natural duties towards them whether or not I submit to the same authority. Since I am always able to discharge those duties—and so always able to respect their freedom—without submitting to an authority, I may never simply find myself subject to one. In this way, the doctrine of natural freedom commits Simmons to consent theory only because political authority is morally optional. If it is not optional, the doctrine of natural freedom would lead to some other, nonconsensual account of narrow political

[26] Simmons does admit that political duties must be optional for a consent theory to be successful. See, for instance, Simmons (2001), 145-146.
[27] Simmons (1993), 75.

obligation.

Let us assume, for now, that political authority is morally optional.[28] Why hold that a person has the power via consent to transfer rights and duties to another? Why hold that her consent can accomplish this? As Seana Shiffrin points out, if the various rights the exercise of which constitutes freedom were inalienable—that is, if persons lacked the power to transfer them under appropriate circumstances via consent—this inalienability would "render impossible real forms of meaningful human relationships and the full definition and recognition of the self (not to mention making medical and dental care cumbersome, dangerous and awfully painful)."[29] As she argues, forming meaningful relationships with others (or even just getting on in a world populated with others) requires, among other things, that persons be able to interact permissibly with others, to share property with them and to physically touch them.[30]

By having the power to consent, I have the power to tailor the various rights I have—rights to control my body, my property, etc.—to my particular circumstances, cares, relationships and projects. For example, my property right in my car makes it wrong (barring special circumstances) for anyone else to decide unilaterally to use it, even when I am not using it myself; this right protects my freedom by ensuring my car's availability, an assurance I can depend upon when, say, I am planning my day. But suppose I would like to lend the car to my friend for a week. And suppose I do not have the right to give him permission to use it because my property right is inalienable. No

[28] It is this claim that political authority is morally optional that will form the basis of my rejection of consent theory in favor of a different (and nonvoluntary) account of political obligation in Chapter IV.
[29] Shiffrin (2008), 502.
[30] Shiffrin (2008), 502.

matter what I say or do, then, he is unable permissibly to use my car. By being inalienable, my property right would seem to restrict certain important avenues of self-determination unnecessarily: in this case, I am prevented from enacting the kind of relationship with my friend that I would like to develop or sustain.[31] A plausible account of freedom as self-determination, then, must include not only an account of rights but also an account of when the agent might transfer those rights to another by the exercise of her normative power to grant permissions, etc., to others via consent.

Even granting that freedom includes the power to consent, we still might wonder, though, why a free person, via the exercise of consent, should have the power to give someone *authority* over her. The thought here is not that we cannot come to have a duty to obey without consenting to that duty, but rather that we cannot come to have it even if we do consent to it, for a relationship of obedience to an authority is not a relationship that even one's own consent can make legitimate. In other words, we need a positive case for consent here because the kind of power an authority purports to have over those subject to it: it has the power to make practical decisions for them and, by commanding, to obligate them to abide by those decisions.[32] In this way, consent to an authority would have consequences much different than a standard instance of consent: a standard instance changes the reasons one has but does not, by that change, cede portions of one's deliberative independence in the way consent to an authority purports to do.

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[31] In particular, I am unable to care for him in certain ways, for caring for him requires not just having a certain attitude towards him and his interests but also being moved to act in certain ways to further his interests. In this case, whatever interests of his would be served by his use of my car I cannot help to further by lending him my car and so I cannot care for him in that way.

[32] Indeed, an authority, depending on its scope, may even have the power to consent in the name of those subject to it, to transfer its subjects' rights and to have them assume duties.

And so, we require an argument specific to the duty to obey a political authority that explains why a person, if she is to possess full freedom as self-determination, must have the power to grant to another authority over her by means of consent. Simmons does not, as far as I can tell, offer such an argument, but I think we can construct one. In his *Second Treatise*, John Locke speaks famously of "the inconveniences of the State of Nature, which necessarily follow from every Man's being Judge in his own Case."[33] And political authority is justified because it ameliorates these 'inconveniences.' Now, we have already seen that, on Simmons' account, political authority must be optional from the perspective of everyone's right to freedom. And so, the inconveniences cannot be so burdensome or restrictive of persons' freedom that their presence itself grounds a duty to obey some political authority that will ameliorate them. But they must be burdensome enough to justify recognizing the person's power to subject herself voluntarily to an authority in order to avoid them.

The argument would be that, while these inconveniences do not prevent me from respecting everyone else's right to self-determination, they may nevertheless affect my freedom in ways that I judge to be harmful to my particular projects, commitments and relationships, those things that I care about and want to see flourish. Granted, my right to self-determination does not give me a right to the success or flourishing of the particular projects or relationships I adopt. However, there seems enough reason to allow me the power to transfer authority to another as a way to overcome those inconveniences when I judge my particular projects, etc., to be important

[33] Locke (1988), 326. This sort of argument is in line with Simmons' general orientation as a 'Lockean.'

enough to justify this transfer and when this transfer does not infringe on anyone else's right to freedom. The value of freedom as self-determination, then, justifies holding that a person possesses the power, under certain circumstances, to transfer a portion of her deliberative independence to another, even as extensive a portion as political authority requires.

The right account of freedom as self-determination must allow for freedom-compatible deference to an authority—deliberative independence is not required for freedom—but, the consent theorist argues, only when the person has, by consenting, voluntarily and knowingly ceded this independence over some sphere of reasons to the authority. For the consent theorist, what is important from the perspective of the person's freedom is that she retain a certain kind of second-order control, which I'll call deliberative control:

> *Deliberative control* is the possession of complete deliberative independence, except for what one has voluntarily, knowingly and publicly surrendered by explicit promises and consents.

For Simmons, a legitimate authority's authority is grounded in and so defined by the subject's own consent, and so the relationship, along with its benefits, is ultimately a product of her own authorship over her life: her subjection to that authority is the result of her exercising judgment in circumstances of deliberative independence.[34] In this way, her duty to obey is a product of an exercise of her own freedom. Anything less than consent, though, severs the connection that establishes this second-order control over this duty to obey,

[34] There is one complication, however. An authority might be legitimate on this view even if it is not directly the product of the person's consent, for it is possible for a person to consent to an authority that has the power to create a new authority. Though this new authority is not the direct result of the person's consent, this new authority is only legitimate so long as the person's consent gave the first authority the right to create new authorities such as it. In that sort of case, then, the new authority is grounded, though indirectly, in the person's original consent.

for, if it cannot be said that she intended the normative change, she cannot be said to have been in control of that change and its consequences and so to have been the author of that sphere of her life. A duty to obey that is not grounded in that person's own consent, then, is incompatible with her freedom because it is not the result of an exercise of that freedom.

On Simmons' account, free persons have the power to grant a purported political authority authority over themselves by consenting to that authority. And the person's consent is the only way she, as a free person, may be properly subject to a political authority and so may have a duty to obey its directives. Because possessing and discharging political obligation is not required for her to be able fully to respect others' freedom, political obligation is morally optional. But, because she might find it advantageous, in light of her own projects and commitments, to be subject to the law of a particular state, she has the power via the exercise of consent to assume political obligation. On Simmons' account, then, law can only have authority over those people who have found it useful to give it such authority.

On his view, then, the chances of legitimate law—here, the law of a state that has gotten the consent of its citizens—are vanishingly slim, at least so long as states take a form even somewhat like current ones.[35] And so, while legitimate law is *possible*, on Simmons' view, this possibility rests on citizens being given the opportunity to consent to its authority and on their choosing to do so. On Simmons' view, then, the sort of political reform crucial for achieving legitimate law is to create the right sorts of consent-situations for citizens so that they might decide whether to consent to the authority of the law. Making the law or legal system more just will still be important but no

[35] Simmons (1979), 191-201.

amount of this sort of institutional and legal reform can give the law the authority it claims.

2.4 Against political naturalism

Simmons takes his voluntarist position to involve, in part, the rejection of what he calls 'political naturalism,' which holds that "the natural condition of persons born within the territories of political societies is one of political membership and political obligation."[36] He says elsewhere that, on the strongest form of this view, "we cannot understand persons, morality or social organization except in terms that already presuppose political organization of some sort."[37] According to political naturalism, as Simmons defines it, a person can be obligated to obey the law simply because she was born to certain parents or within certain borders.

Against this kind of view, Simmons argues that the relationship of co-membership in a political community is "artificial" rather than natural, that is, it is "the product of human artifice,"[38] and so it cannot be one in which persons may simply find themselves.[39] This class of views he labels 'individualist' because, on such views, "persons and much of their social interaction… may be understood in purely apolitical terms. The political realm must be seen as a contingent, nonessential aspect of human life, despite its being typically achieved in human groups."[40] Voluntarist views such as

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[36] Simmons (2001), viii.
[37] Simmons (1993), 36. Certain communitarian views seem to count as naturalist in this strongest form, though it is by no means obvious. See, for instance, Yael Tamir's *Liberal Nationalism* (1993), Michael Sandel's *Liberalism and the Limits of Justice* (1981), and Charles Taylor's "Atomism" (1985).
[38] Simmons (2001), viii.
[39] For Simmons, political naturalism makes political membership and obligation objectionably dependent on the arbitrariness of birth: "The assertion of our natural moral condition is *nonpolitical*… is a refusal to accept mere accidents of birth as the source of substantial moral differences among persons" (Simmons (1993), 38).
[40] Simmons (1993), 36.

Simmons' count as individualistic in this sense, but some nonvoluntaristic ones also count as individualistic, such as a view claiming that a person's receipt of certain important benefits from society by itself gives her fairness-based political duties; this sort of view is individualistic because the relationship of benefit-receipt is a contingent one.[41]

Simmons is right to reject political naturalism, but he is mistaken in rejecting all non-voluntarist versions of political liberalism. Granted, the freedom constraint may seem to require voluntarism, at least on an account of freedom as some sort of self-determination, for self-determination may seem to require nothing if not at least the kind of deliberative control Simmons' view is concerned to protect. That the freedom constraint does require voluntarism may seem especially plausible when the contrasting nonvoluntarist individualist view is, say, the unknowing and/or unwilling receipt of important benefits, for, at least at first glance, that kind of receipt seems determined by the choices and actions of others, not of oneself.

However, it seems to me that there is space for an individualist view that, though it satisfies the freedom constraint, would count as nonvoluntarist on Simmons' understanding. Consider that many of the special responsibilities persons have toward others they have neither simply as a result of the circumstances of their birth nor as a result of consenting to them (or even to a deliberate choice to assume them). Instead, these responsibilities arise out of their valuable relationships that have themselves come about

[41] Simmons does admit at one point that "contingent nonvoluntary relationships (like the receipt of benefits by some from others) between persons, or between individuals and governments or societies, might be taken to establish political ties" (Simmons (1993), 36). He argues forcefully against the possibility that the principle of fairness could establish political ties in this way (Simmons (2001)), as well as against using a duty of gratitude in this way (Simmons (1979)).

gradually out of various, individually innocent interactions.[42] It is only when these interactions are taken together to constitute a history that they form a relationship grounding responsibilities.

A person need not have consented at any time to these responsibilities nor need she have even believed at any one time that her performance of these various interactions that together constitute a relationship would give rise to responsibilities.[43] The responsibilities are simply part of the relationship. As Samuel Scheffler argues, merely recognizing the non-instrumental value of a relationship requires, in part, recognizing various responsibilities to those others in that relationship (including perhaps a duty to defer).[44] This recognition of this value, and so of the special responsibilities, does not amount to consenting to the relationship, for this recognition is an acknowledgement that one already has the responsibilities, and so these responsibilities must be grounded in something other than this recognition. And certain relationships, as I will argue in Chapter VI, are such that members can have a duty to defer to the judgment of some other member of the relationship.

The right conception of freedom must allow for these kinds of valuable relationships, but, if it does, it must also allow for this kind of discovery of special responsibilities, including of a duty to defer. In this way, Simmons must be mistaken in holding that deliberative control is necessary for freedom.[45] And, it seems, if the relationship of co-citizenship in the right kind

[42] These relationships—friendships, etc.—generally are not things to which a person consents in the contractual sense (or even the broader sense).
[43] But this is not to say that the individual did not enter into the relationship freely; rather, she did so without performing any act that constituted consent.
[44] Scheffler makes this claim in "Relationships and Responsibilities" (2001) and "Projects, Relationships and Reasons" (2004).
[45] It is not clear to me whether Simmons' political voluntarism is independent of any claim about other, non-political responsibilities or is rather a part of a larger voluntarism about

of political community is one of these valuable relationships, we can develop an account of the duty to obey the law that avoids both political naturalism and Simmons' political voluntarism. The main aim of this work is to develop this relationship-based account of narrow political obligation.

3. More Permissive Consent Accounts

Some have argued that Simmons' account misunderstands consent—it construes it too narrowly—and that, as a result, his account of political obligation is too restrictive. When consent is understood rightly, they argue, a consent account of political obligation will find many more citizens of reasonably just states with a duty to obey the law. I will defend Simmons' account here against two of these arguments.

The first argues that, since tacit consent is a legitimate kind of consent, those citizens who fail to emigrate when they have the chance have thereby consented tacitly to a duty to obey the law of their state. This 'tacit consent' account has a long history, beginning arguably with Locke, though there have also been recent defenders, including Harry Beran. But, as I argue here, the mistake this tacit consent account makes lies in what it takes to express the citizens' consent, namely, those citizens' failure to emigrate. An action or omission can only express a person's consent or refusal to consent if the action or omission is itself substantially cost-free, for it is only then that it can publicly express that person's free exercise of her power to consent.

(most) special responsibilities. And this is, in part, because of an ambiguity in the use of the term 'choice,' for instance, when Simmons claims, "The course our lives take should be determined as fully as possible by our own voluntary choices" (Simmons (1993), 37). Many relationships (and their attendant responsibilities) are determined by our choices but not, strictly speaking, by our acts of consent. But Simmons seems to suggest that, insofar as this claim is an argument not only against political naturalism but *for* political voluntarism, our lives are determined by our voluntary choices only to the extent that the changes in the normative situation are those to which we have *consented*, and this points to a broader commitment to voluntarism.

Emigrating is, of course, quite costly.

The second argues that, when refusing to consent is morally wrong—when a person has a *duty* to consent—the moral situation is as if she has consented; and, because refusing to consent to a duty to obey democratically-enacted law would be morally wrong, citizens have a duty to obey such law. On this view, even though citizens of a democratic community have not consented to a duty to obey—because they have not been given the chance to—the moral situation is as if they have consented. These citizens, then, have a duty to obey the law grounded in this particular kind of hypothetical consent. This 'normative consent' account is new, having recently been advanced by David Estlund. But, as I argue, the mistake this account makes is that its understanding of consent divorces the person's power to consent from its basis as an exercise of her freedom as self-determination.

3.1 Tacit consent

There is some question as to why the consent at issue for political obligation must be give by a public performance: Why must the consensual transfer of rights and/or duties be public if it is to succeed? The core of the answer, I argue, is that a person can only successfully transfer rights to another if that other has sufficient reason to believe that she intends by some sign to accomplish such a transfer. And so, it is not enough for the success of such a transfer that she intend the transfer; she must also be known by others to intend it.[46] This claim that consent must be public is important for understanding why it is not the case, despite what some consent theorists

[46] The requirement that the transfer be public seems to me to mark one important difference between, for example, a promise to do *x* and a personal vow that one will do *x*.

claim, that many citizens actually do have political obligation because, by failing to emigrate, they have tacitly consented to a duty to obey the laws of their state.[47] I argue here that, once we appreciate the publicity requirement for consent, we can see that a citizen's failure to emigrate cannot count as her tacit consent to a duty to obey the law.

What is the difference between express and tacit consent? If they are both to count as species of the contractual kind of consent, they both must satisfy the three conditions specified in the previous section. And so, the difference, as Simmons makes clear, should be merely in the manner in which the consent is publicly expressed to others.[48] Express consent is consent given, say, by uttering the phrases "I consent to…" or "I agree to…", or by acting in some other way that conventionally signifies expressing consent, for instance, by raising one's hand, nodding one's head 'yes,' or signing one's name to a contract. Tacit consent, by contrast, is consent given by remaining silent or inactive or by a failure to do some particular thing(s) in the relevant situation. Despite this difference, Simmons emphasizes, "tacit consent is nonetheless given or expressed."[49] The distinction, then, lies simply in the manner in which the consent is publicly given—consent by action vs. consent by inaction—not in its significance or bindingness.

Tacit consent faces a certain difficulty that express consent, at first glance, does not seem to face: Which actions are such that the failure to do them are capable of counting as expressing consent? Given the requirement that the consent be public, it seems that silence or an omission can count as

[47] For recent debate about tacit consent accounts of political obligation, see Simmons (1987) and (1993), Beran (1987), Murphy (1981) and Klosko (1981).
[48] Simmons (1979), 80 and Simmons (1993), 226.
[49] Simmons (1979), 80.

expressing consent so long as there is no reasonable interpretation for others to give that silence or omission other than that it is the expression of the intention to bring about the normative change; otherwise, they will lack sufficient reason to believe that the person is consenting. Express consent seems to avoid this difficulty because, barring special circumstances, the conventional expressions that are used clearly satisfy this condition: There is normally no other reasonable interpretation to give someone's saying 'I consent to…' than that she intends the specified normative change. In other words, a person normally does not have reason to say 'I consent to…' (or whatever normally expresses consent) except for whatever reasons she has actually to try to accomplish the normative change via consent.

For an action or omission to count as expressing consent, then, the person should not have any other (strong) reasons to act or omit in that specific way, for, should she act or omit for those other reasons and not in order to consent, counting her as consenting defeats the purpose of her having that power in the first place. Of course, even if she had other strong reasons for acting or omitting, she still may act or omit in order to express her consent; this possibility, however, is not enough to satisfy the publicity requirement for genuine consent: the others must lack good reason to think that she acted or omitted for some other reason. And so, it is a problem for tacit consent when sizeable costs are attached, not to refusing to consent, but to failing to omit whatever action the omission of which is supposed tacitly to express that consent. There is, then, a problem concerning self-determination and consent that does not, in normal cases, attach to express consent.

To see this problem, consider one of Simmons' examples, which we will call *Chairman Jones I*:

> Chairman Jones stands at the close of the company's board meeting and announces, "There will be a meeting of the board at which attendance will be mandatory next Tuesday at 8:00, rather than at our usual Thursday time. Any objections?" The board members remain silent and inactive.[50]

In this case, there are no sizeable costs directly attached either to remaining silent or to voicing an objection, and so such silence can, by Jones' decision, count as expressing consent. Now, consider Simmons' variation on that case, which we will call *Chairman Jones II*:

> Suppose instead that Jones, when asking whether anyone objected to the meeting time, said, "Anyone with an objection to my proposal will kindly so indicate by lopping off his arm at the elbow."[51]

In Chairman Jones II, there are costs directly attached to the action that expresses dissent—and *not* to dissenting itself—and these costs are so great that it is almost impossible to deny that the board members failed to act in that way, not in order to express their consent to the meeting time, but in order not to lose an arm. It would be quite unreasonable, then, to interpret failure to lop off one's arm as an expression of consent (whether or not the board members, in fact, lack any objection to the new meeting time). Observe here that the question of whether their failure to lop off an arm should count as an expression of consent is not a question of whether the board members' *de facto* consent was freely given—and so whether it should count as genuine and binding—but of whether any *de facto* consent was given at all (freely or not).[52]

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[50] Simmons (1979), 79-80.
[51] Simmons (1979), 81
[52] Simmons takes Chairman Jones II to be of a situation that fails to satisfy two different conditions under which an omission can count as consent: (1) "the means acceptable for indicating dissent must be reasonable and reasonably easily performed;" and (2) "the consequences of dissent cannot be extremely detrimental to the potential consentor" (Simmons (1979), 81-82). My point here is that it is not clear that the case does fail to satisfy (2), once we distinguish dissenting itself from expressing such dissent: the detrimental consequences attach directly to what expresses dissent and only indirectly to dissenting insofar as the action does, in fact, express dissent. If the action cannot express dissent, then

It must be said, however, that express consent can be similarly disqualified. Consider two other of Simmons' examples, which we will call *Owner Jones I and II*:

> The first contract is made at the point of a gun. Jones, the owner of a small manufacturing firm, is forced by J.R., his ambitious competitor, to sign a contract selling J.R. his firm for a small fraction of its worth. Jones, afraid of being shot dead, complies with J.R.'s demands. The second contract is signed in a different possible world, one in which Jones' firm is slowly but surely failing. Jones calls his competitor J.R., they meet and negotiate, and finally Jones agrees to sell his firm for a small fraction of its worth. This time the contract is signed because of Jones' fear that if he does not sell for whatever he can get, he will lose everything.[53]

Simmons is concerned here to explain the difference between these two examples, for Jones has not bindingly consented in Owner Jones I but he has in Owner Jones II, even though he is motivated by fear in each.

Now, the relevant difference seems to me to be that, in Owner Jones I, Jones is motivated by fear about what will happen if he does not sign the contract, while, in Owner Jones II, he is motivated by his fear about what will happen if he does not (consent to) sell the business.[54] The difference, then, is between "I must sign this contract or I will die" and "I must (consent to) sell my business for what I can get or lose everything." In Owner Jones I, an

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there is no reason to consider the consequences of expressing dissent as consequences of dissenting.

[53] Simmons (1993), 234-5.

[54] The relevant difference, then, is not, as Simmons and others would have it, that Jones' consent in the first case is nonvoluntary (and so unfree) and in the second case, though a hard choice, still voluntary. See Simmons' discussion of this case in Simmons (1993), 232-240. Granted, there does remain the question of whether the contract in Owner Jones II is valid—whether Jones' consent is binding—because, as Simmons discusses, it is possible for the contract to be "unconscionable": "Where one party to a contract has an unfair bargaining strength, created by another's special vulnerability, and he takes unfair advantage of that vulnerability in contract, the agreement is not enforceable" (Simmons (1993), 237). But this question, I argue, does not arise in Owner Jones I because it is already disqualified: because of the costs attached to failure to sign, Jones' signature cannot count as expressing consent.

observer would have very good reasons to think that Jones signed not in order to consent to sell his business but rather to avoid dying as the hands of J.R.[55] But, in Owner Jones II, there are no costs attached merely to the failure to sign that Jones would have reason to avoid by signing; the costs in question—utter ruin when his business fails—are attached to refusing to sell, or, more precisely, to refusal to consent genuinely to sell to J.R.

Consider now the debate about whether continued residence in one's state—or, in other words, one's failure to emigrate—can count as tacitly consenting to a duty to obey the law (or, for that matter, to any other political duties). As far as I can tell, the debate seems to pass over the question of whether this particular omission—one's failure to emigrate—can count as an expression of consent, that is, as a public expression of an intention to assume a duty to obey.[56] If it can count as an expression of consent, then the situation would amount to the state, represented by some government official, saying to the assembled residents: "Residents will, from this point forward, have a duty to obey the law. Anyone who objects to this proposal, please indicate so by emigrating."

I think it clear that the state is not justified in counting a resident's failure to emigrate as an expression of consent, for emigrating normally carries with it various large costs independent of any costs she would face by refusing her consent in a suitable express-consent situation.[57] For example,

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[55] One consequence of my argument is that, in Owner Jones I, Jones is unable to consent, even if he does actually want to sell his business for a small fraction of its worth (and so even if he signs with the intention that his signature express his consent). And he is unable because J.R. has put Jones in a situation in which what normally expresses consent—and does so uncontroversially—no longer can.

[56] Instead, the debate seems centered on whether the choice to emigrate or to remain counts as a hard but still free choice. See Simmons (1979), 95-100; Beran (1983), 497-498; and Simmons (1993), 240-248.

[57] As Hume emphasizes in his well-known objection in "Of the Original Contract." Though Hume's discussion does not distinguish between the question of whether what expresses

emigrating requires one to leave those one loves and to leave the home, way of life and perhaps landscape to which one may be quite attached. These are not inconsiderable costs, and, because of them, it would be quite unreasonable for an observer to think that the resident who fails to emigrate intends by her failure to take up a duty to obey. To be clear, the claim is that the costs attached to the action or omission that is supposed to *express* consent disqualifies it as an expression of consent, *not* that the costs attached to consenting disqualifies it as genuinely binding consent. The latter is a separate question.

Why say that the failure to emigrate cannot count as an expression of consent? The following seems to me a good test: Were we to replace the tacit-consent situation with an express-consent situation—in which the person's consent is expressed by a simple 'I consent to…'—would she expressly consent? This is a good test because, as we have noted, a person normally has no reason to utter the conventional expressions that count as giving express consent (or those that count as refusing to give consent) except in order either to give (or refuse) consent. In this case, then, we are to imagine the answer residents would give were the official to ask them each individually, "Do you consent to bear a duty to obey the law of this state?" If they would refuse in this latter situation, as many probably would, then their failure to emigrate in the former cannot count as an expression of consent. And so, failure to emigrate does not even get off the ground as a potential expression of consent.

That failure to emigrate cannot count as expressing consent to a duty to obey the law of one's state, however, does not by itself entail that residents

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consent (or dissent) has large costs or whether consent (or dissent) itself has them. See Hume (1970). 263.

who fail to emigrate do not have such a duty. They very well may have one—say, because they are enjoying the benefits of living in the state—it just cannot be a duty grounded in their consent. If they do, we can still say, of course, that the residents are freely choosing not to emigrate, and that, because they have not emigrated, they have political obligation. And we may even be able to say that the state is justified in confronting its residents with the choice between emigrating or having political duties, though we must clarify what exactly this choice actually amounts to.

There seem to be two possible ways of understanding this confrontation, neither of which amount to placing residents in a genuine consent situation: (1) some fact(s) connected with residency are sufficient to give a citizen or resident political duties, and the choice the state offers the citizen (or resident) is, strictly speaking, between emigrating and *being held to* those political duties she already has; or (2) there are no facts connected to residency that are together enough to give the person political duties, but the state has decided henceforth to attach political duties to residency as a justified cost, and it offers her the choice between emigrating or coming to have those duties by remaining a resident.

Notice that, on the first kind of confrontation, the political duties she has do not result from her choice not to emigrate, for she already has them prior to her decision in that choice-situation. Those political duties may be explained by any of the other prominent accounts of political obligation and so it is open to a partisan of any of these to admit that the state may have reason to put citizens in this kind of a choice situation without this admission making her a consent theorist. If this is the confrontation, then residents' political duties will have some basis other than consent.

On the second kind, though, the duties do result from her choice not to emigrate: she did not have them prior to the choice, and she chose to assume them. Why not say, then, that there is a perfectly good sense in which, by choosing in this case not to emigrate, she has consented to having political duties? It is true that, in one sense of consent, she has consented to them, for she made her choice knowing the (normative) consequences of that choice and so must have found them acceptable under the circumstances. But consent in this attenuated sense is insufficient for a consent account of political obligation, for to call this kind of choice consent is to say that we consent to the (normative) consequences of all of our voluntary choices: I choose to have a child, I consent to the duties of parenthood; I choose to go swimming in the ocean, I consent to a duty to save others swimming nearby if it is not too dangerous for me; I choose to become a doctor, I consent to having a duty, when on a plane and am able, to help people in medical distress; I choose to mug a little old lady, I consent to serve time if caught and convicted. And to say that I have consented in these cases seems merely to say that I cannot plead any excuses in order to avoid facing the normative consequences of my actions: I made my choice under conditions sufficient for bearing responsibility for it.[58]

Should the state confront residents, then, with this second kind of choice—one between emigrating or coming to have political duties—it would do so in order that, if they decide, for whatever reasons, to remain a resident, it can rightly hold both that they have political duties and that they lack any excuses for failing to fulfill them. We may certainly call this a kind of consent, but it is a kind that can be given unintentionally (though perhaps not

[58] Consent in this thin sense seems to be what some have called 'implied consent.'

unknowingly),[59] and, in this way, the person's will does not play the role that it does in the contractual kind of consent, and so this consent cannot stand in for the contractual kind in consent accounts of political obligation.[60]

Someone might object here by arguing that this other, non-contractual sort of consent does sometimes do the right kind of work, for example, in the following case, which we'll call *Restaurant Patron*:

> A patron at a restaurant, you order something off of the menu but do not intend to pay for the meal when you've finished.

Even though you do not intend to pay, do you not, by ordering, still tacitly consent to pay the price listed on the menu? And is not this tacit consent the basis for your duty to pay? Leslie Green discusses this example, and notes that the duty has the following basis: "I freely perform an action, knowing that it is understood to entail some duty, and I am therefore bound by the duty."[61] Green rightly admits that my ordering food can, in one sense, count as consenting to pay, but he cautions that the justification for saying that I have a duty there is different than in cases of contractual consent: "[T]he underlying principle is one of estoppel, justified as a means of protecting the interests of the parties who might be harmed if the agent later rejected the duty on the grounds that he had no intention of assuming it."[62] Your action in Restaurant

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[59] That is, a person may remain a resident while intending that her failure to leave *not* count as her consent. The point, though, is that, if they do come have a duty to obey the law because they have remained, it is not because they have consented to it in the contractual sense but simply because, understanding the consequences of remaining, they have chosen to remain.

[60] Furthermore, the plausibility of this second choice depends on making sense of the state's authority or standing to decide itself to attach political duties as costs to residency and its benefits, since these costs aren't automatically so attached. And it's not at all clear to me one what grounds we'd ascribe this sort of power to the state in the first place. This second kind of confrontation, then, is not the right kind of consent situation either.

[61] Green (1988), 164-5.

[62] Green (1988), 165. Simmons offers a different take on this sort of case: If you "knew full well that [your] order amounted to an agreement to pay for the food," ordering the food then does count as consenting to pay for it. But if you genuinely did not know that ordering food at a restaurant counts as consenting to pay the advertised price, then it matters whether your ignorance is innocent or a result of your negligence: "Ordinary, excusable ignorance defeats

Patron, given its context, gives the staff good reason to believe that you will pay, a belief that they rely on in deciding to bring you the food you want; since they rely on this reasonable belief, you are bound to pay.

Now, you may order the food simply because you are hungry and even while intending not to pay. However, the reasons why you order do not matter here because it does not matter whether you consent (in the contractual sense) to pay. Of course, what makes the staff's beliefs reasonable are the general conventions associated with how restaurants operate: the restaurant need not offer you a contract or some other consent-situation when you enter in order to get your consent to this food-for-money operation; they may merely abide by the conventions established by the community and reasonably expect their patrons to abide by them as well. As Green notes, this sort of estoppel account cannot work for political duties, because the state itself has no interests that would be harmed by my refusal, say, to obey the law in the same way that my refusal to pay for my meal harms the interests of the restaurant.[63]

The requirement that consent be public—that is, that it be known by others that the action or omission meant to express consent actually does so—disqualifies failure to emigrate as an expression of a citizen's tacitly consenting to assume political obligation. A consent theorist, then, cannot appeal to tacit consent in order to find more citizens with a duty to obey the law than a standard consent account such a Simmons' would find, for tacit consent is not a more permissive kind of consent. The only difference between express and tacit consent lies in the *way* the consent is expressed.

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the claim that consent was given. Negligent ignorance may not." See Simmons (1993), 229-230.

[63] Green (1988), 164.

3.2 Normative consent

In his *Democratic Authority*, David Estlund has recently offered a consent-based theory of authority that is distinctive, in large part, because it claims to be able to accommodate the thought that authority can simply befall us. Estlund's view is a form of hypothetical consent theory he calls "normative consent": a citizen can come to have a duty to obey the law when it is the case that, were she given the chance to consent to the duty, she would have a duty to consent to it. On Estlund's view, when a person's refusal to consent to such a duty is morally wrong, that non-consent is "null" and the moral situation is as it would be if she were to consent as she is required to.[64] And, when the law is the result of a democratic procedure, citizens would have a duty to consent to a duty to obey it.[65] According to this normative consent account, when the law is democratic, citizens have a duty to obey it whether or not they have actually consented to it because they would have a duty to consent to this duty to obey.

Estlund characterizes standard consent theory in the following way:

> Without consent there is no authority (the *libertarian clause*), but unless there are certain nullifying conditions (the *nullity proviso*), consent to authority establishes authority (the *authority clause*).[66]

The nullity proviso is important for Estlund's argument. Estlund observes

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[64] Estlund's 'normative consent' account is hypothetical in two ways: The moral situation is as if you had been put in a consent-situation and it is as if, when in that situation, you had consented. In this way, your normative consent can give you a duty not only whether or not you actually consented to it—it is as if you did—but also whether or not you were even given the appropriate opportunity to—it is as if you were.

[65] They would have a duty because "the task of having people obligated to obey their district for the administration of public justice is an important task in its own right, important enough that each of us would be wrong to refuse to commit if offered the chance" and because of the comparative epistemic advantage of democratic governance: it makes better decisions than other "qualified" forms of governance (Estlund (2008). 11). For a summary of Estlund's overall account of the authority of democracy, see Ch. I of his *Democratic Authority* (2008), 1-20.

[66] Estlund (2008), 119.

that a person's consent is sometimes null—the situation is as if she did not consent—when given under certain conditions (such as duress or coercion), and he finds that "there is an interesting asymmetry of a sort in consent theory": "Consent only establishes authority if it meets certain standards, whereas non-consent establishes non-authority without the need to meet any standards at all."[67] He proposes that his claim that refusals to consent can also be null—they can fail to prevent the establishing of authority—because they are wrong "has some standing on grounds of symmetry."[68] This use of the notion of symmetry, however, obscures the way in which the question of consent only arises once rights and duties are already distributed among persons on independent moral grounds.

In one section, Estlund discusses what he calls 'the moral power to withhold consent': "Often, it is a source of freedom and power to be able to refuse to consent to something and *thereby* prohibit certain actions of others."[69] The problem here is that it is *not* simply the refusal to consent that prohibits certain actions, for, if the person has to power, via consent, to permit those actions, her decision not to use that power of consent—her decision to refuse her consent—is simply a decision to leave things as they are. The refusal to consent is better understood, I think, as the decision to refrain from exercising a power rather than as itself the exercise of a power. Estlund's account seems to depend on understanding the power to consent and the power to refuse to consent as two separate powers, for then it makes sense to question the asymmetry Estlund finds in standard consent, namely that consent can be null while non-consent (or, the refusal to consent) cannot. But, if non-consent just

[67] Estlund (2008), 121.
[68] Estlund (2008), 123.
[69] Italics added.

is refraining from exercising the power to consent and if having the power to consent just is to have it be up to you whether some rights-transfer takes place, then the 'asymmetry' makes sense: an act of consenting is only genuine—and so binding—when it is an exercise of the person's freedom, and sometimes certain acts of consenting fail to count as the person exercising her freedom.

Estlund's normative consent account holds that, when a person who is not subject to an authority is confronted with a consent-situation concerning her subjection to that authority, her refusal to consent can be null because morally wrong, and, when that refusal is null, the moral situation is just as it would be if she had acted morally rightly and consented. In this situation, then, her subjection to authority is grounded in this sort of hypothetical consent. And so, a person confronted with the choice of consenting to a new authority can become subject to that authority whether or not she has consented to it—indeed, even if she has explicitly refused her consent—so long as she has a duty to consent to it.

It is important for Estlund's account that the authority is *new*—nothing prior to the consent situation establishes this authority—for otherwise it would not be on account of the duty to consent that the new authority comes to have authority over the person. Consider Estlund's example of Joe and the flight attendant:

> Consider a flight attendant who, in an effort to help the injured after a crash, says to Joe, "You! I need you to do as I say!" Let us not yet suppose this puts Joe under her authority. Even if it does not, Joe would… be morally wrong not to agree to do as she says (at least under a significant range of circumstances). Once that is granted, the question remains whether by refusing, wrongly, to

> agree to do as she says, Joe has escaped the duty to do as she says.[70]

As Estlund constructs the example, Joe faces a consent situation, for the attendant's authority is not yet established prior to Joe confronting the question of whether to agree to do as the attendant says. And, as Estlund notes, the consent theorist will say that Joe has escaped the duty to do as the attendent says:

> Consent theory, with its libertarian clause, draws the libertarian conclusion: Joe may have various obligations in such a terrible scenario, but the flight attendant's instructions have no authority over him. Why? *Because, lucky for Joe, he is despicable.*[71]

Estlund finds this conclusion—that Joe can escape subjection to the flight attendant's authority by acting despicably—implausible and, for this reason, rejects standard consent theory. Persons should not, the thought goes, be rewarded in this way for their moral flaws.[72] Estlund continues:

> If you find consent theory's implication implausible here, as I do, then you think that Joe has not escaped the authority by refusing to consent. So he is under authority even without having consented. In this case, non-consent to authority is null. If this is granted, [standard] consent theory must be rejected.[73]

Estlund is right, I think, to claim that Joe is unable to escape subjection to the flight attendant's authority by refusing to consent: Joe's refusal to consent is indeed null. But this claim—that Joe's refusal is null—does not yet support a normative consent account of the flight attendant's authority. There is no more reason to think Joe is subject to her authority *because* his refusal to

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[70] Estlund (2008), 124.
[71] Estlund (2008), 124. Emphasis added.
[72] It is not clear why we should think that Joe's successful avoidance here is a 'reward,' unless we should assume (implausibly) that subjection to an authority is always a burden to be avoided. Joe is not 'lucky' that he is despicable because he thereby avoids subjection to the flight attendant's authority, for there seems no reason why he should want to avoid subjection to her authority in these circumstances.
[73] Estlund (2008), 124.

consent is wrong, as Estlund's normative consent account would have it, than there is to think that the flight attendant's shout by itself already subjected Joe to her authority. In other words, it may be that his refusal is null not because he faces a consent situation and has a duty to consent but because he does not face a consent situation at all.[74]

This is a version of what Estlund calls 'the direct authority objection' to his normative consent account. But it is not the version that he considers. That version of the objection claims that, whenever it would be wrong to refuse to consent to some proposed new authority, the facts that make this refusal wrong also already establish the authority in question independently of this question of consent.[75] Estlund rightly replies to this objection that, since "whether consent to new authority is morally required is not the same question as whether it is present," the objector must explain how whatever moral facts make refusing to consent wrong also happen to establish that authority independently.[76] She bears the burden of proof.

My version of the direct authority objection is different, for it claims that, whenever it would be wrong to refuse to consent to some proposed new authority *and such refusal is null*, the facts that make such a refusal both wrong *and* null also already establish the authority in question independently of this question of consent. Indeed, this objection claims that, when refusal to consent is both wrong and null in these sorts of cases, it is not null because it is wrong, as Estlund's normative consent account would have it, but wrong

[74] Estlund says, "So, to sum up the point of the example: when she asks Joe to agree to do what she says, it is (new) authority… that Joe would be wrong not to agree to." The problem lies in the inclusion of the parenthetical 'new,' and it is this very 'new' that is crucial for the success of Estlund's account of normative consent: normative consent cannot provide an independent basis for authority if it cannot justify a person's subjection to a new authority.
[75] Estlund (2008), 129.
[76] Estlund (2008), 130.

because it is null and null because authority already exists. In these cases, the person does not actually face a consent situation, and so in refusing her consent she is really refusing to acknowledge a duty that she already has, and this refusal is quite clearly wrong. Of course, there may be other cases in which refusal is wrong—cases in which what makes the refusal wrong does not also already establish authority—but, in these cases, the refusal is *not* null: the refusal to consent to the proposed new authority does, in these cases, allow the person to escape that authority. In other words, refusing to consent can be wrong because it is null or wrong but not null, but it cannot be null because it is wrong. Normative consent cannot establish new authority.

Consider again the case of Joe and the flight attendant. My claim is that the question of whether his refusal to consent is null depends on whether the flight attendant's shout by itself already subjects him to her authority. If it does, then his refusal is null; if it does not, then his refusal is not. Estlund's view requires that this relation of dependence does not obtain: his refusal can be null even when her shout does not already subject him to her authority.

The power to consent, along with the power to promise, is an important power persons have, for it allows a person to tailor the distribution of rights and duties in her own moral world in the service of her own projects, commitments and relationships. This power consists in the prerogative to decide whether or not to transfer those rights to another.[77] And those situations in which the person has this prerogative can be called 'consent situations.' In this way, possessing this power to transfer rights via consent is an important component of a person's freedom as self-determination. And,

[77] Provided, of course, that she possesses the rights in question and that the various nullifying conditions are not present,

the various nullifying conditions Estlund groups together as 'the nullity proviso' are those conditions that, if present, prevent a candidate exercise of consent from being successful because it is not an exercise of freedom properly understood.

Now, what about when a person refuses to consent, but wrongly so? Why does the wrongfulness of the refusal not nullify this refusal, thereby transferring those rights as if she had (rightly) consented? As I have already suggested, there is a sense of consent in which non-consent *is* null. When the person's consent is not required to effect a rights-transfer but rather required as an acknowledgement of the distribution of rights and duties, her refusal to consent has no effect on the distribution and is, in that sense, null. A person's refusal to consent in this sort of case is wrong, then, not because it prevents a transfer of rights and duties—there is no transfer at issue—but because it is a refusal to recognize as legitimate others' rights and her duties to respect those rights.

But what about a case where the person's consent is needed to accomplish a morally required transfer of some right? This is the sort of case that worries Estlund. Surely, he urges, a person cannot prevent this morally required transfer from occurring by wrongly refusing to consent. Now, I am not sure why it is implausible to say that a person can misuse her power to consent—she can use it to act wrongly—just as she can misuse her other powers. Regardless, what Estlund's account seems to miss here is that, if it is a case where the person faces a genuine consent situation (as the case of Joe is intended to be), then it is a case where the person's freedom as self-determination is a morally relevant consideration just as whatever it is that makes the rights-transfer morally necessary. If the case really is a case in

which, on account of his interest in freedom, the rights-transfer depends on what happens in a consent situation, then the rights-transfer only happens if his consents to the transfer, even it if would be morally wrong for him to refuse to consent.

Were the person's refusal in *this* sort of case to be null—as Estlund's account has it—then it would instead be a case where the moral importance of the rights-transfer overrides, trumps or cancels out any claim he might have, on grounds of his interest in freedom, to a right to decide for himself whether the transfer happens. But, because in this sort of case he has no prerogative to decide on the rights-transfer, it cannot be the fact that, were he to have that prerogative in these circumstances, it would be wrong for him to refuse to consent that accomplishes the transfer. This counterfactual assumption that he has this prerogative (and so faces a consent situation) in circumstances otherwise identical to those in which he lacks the prerogative is illegitimate, for his interest in freedom as self-determination does not, in these circumstances, justify his having this prerogative.

In other words, when Estlund claims that "[n]ormative consent is present when it is the case that if you had been offered the chance to consent to authority, you morally should have consented, and as a result the authority situation is as it would have been if you had," the mistake lies in the claim that the person could have been put in a genuine consent situation by being offered the chance to consent.[78] This point is clearer in the case of Joe and the flight attendant, for Joe is supposed to be put in a consent situation when the flight attendant offers him the chance to consent, but, on Estlund's account, whether he is subject to her authority is not up to him, for what matters is the

[78] Estlund (2008), 128.

fact that he morally should consent here. In this case, Estlund's account has it that he both is and is not put in a genuine consent situation.

The difficulty becomes clear when we consider what it is to be 'offered' the chance to consent to authority. In most cases, the offer of the chance to consent does not, by itself, transform the situation into a genuine consent situation, for the person offering the chance to consent does not, in most cases, have that moral power to create consent-situations. In the case of Joe and the flight attendant, the flight attendant seems to offer Joe the chance to consent. But whether Joe is subject to her authority only if he consents to her authority—as consent theory has it—does not depend on the flight attendant's decision to offer him the chance to consent. Joe might be in a genuine consent situation even if she does not offer him that chance to consent, and he might not be even if she does offer him that chance.

What goes into determining whether he is in a genuine consent situation? The rights-transfer in question here—Joe's assumption of the duty to obey the flight attendant's directives—serves various morally important interests, particularly the other passengers' interests in preserving life and limb. To determine whether this rights-transfer depends on Joe's consent, we must compare the interests served by the rights-transfer with Joe's interests in freedom as self-determination, in being the one to determine the contours of his own moral world. It should seem clear that Joe's interests here pale in comparison to the interests of his fellow passengers, and so there is little reason to think that Joe is in a genuine consent-situation: his subjection to the flight attendant's authority does not depend on his consent.

Why, then, might the flight attendant offer him the chance to consent? Because, by doing so, she puts Joe in a different, but important, kind of

situation in which what the person is being asked to do is to publicly acknowledge that a rights-transfer has already taken place. We can call this a 'commitment situation.' In this case, then, what Joe is offered the chance to do is to *acknowledge* that she has authority over him. By having her authority acknowledged by Joe, she is able be confident of his commitment to the project of helping the injured passengers. And, since she does already have authority over him, it would be wrong of him to refuse to acknowledge that this is the case.

My claim here, then, is that Estlund's account of normative consent as a distinctive basis for authority fails: when non-consent to authority is null, it is nullified not because you would have a duty to consent if given the chance but because that authority already exists. To claim, as Estlund does, that refusal to consent to an authority can be nullified even if authority does not already exists is to radically revise the picture of how consent works away from the core claim that the exercise of this power to consent is an exercise of freedom.[79] Normative consent, then, is not an independent source of duties, and so it cannot be marshaled to extend a consent account of political obligation such that that it finds more citizens of a democratic state with a consent-based duty to obey the law than an account such as Simmons' finds.

4. The Practical Implications of Political Voluntarism

On Simmons' political voluntarism, most citizens of every existing state, many of whom mistakenly think they have broad political obligation—both political duties and narrow political obligation—do not in

[79] Both the consent theorist and other direct authority theorists all can accept this standard picture of how consent, as a moral power, works. The consent theorist simply claims that it is never the case that non-consent to authority is null because authority already exists, while the direct authority theorist denies this claim.

fact have it: their *de facto* political relationship does not, by itself, give them any special duties towards each other.[80] Simmons' view, then, is a form of philosophical anarchism. As he puts it,

> We are bound to act towards our colleagues, our governors, and members of other societies all as fellow residents of a highly socialized state of nature, one in which we all are surrounded by many people with false beliefs about their rights and duties with respect to us.[81]

Some have argued that the practical implications of Simmons' anarchism—how it is people would be allowed morally to act in a highly socialized state of nature—are sufficient to justify its rejection.[82] But, as Simmons rightly points out, this denial of any "special moral bond" between citizens and their state (and also, one must think, among citizens as well) does not, by itself, amount to a justification of widespread disobedience of the law.[83]

With regard to the behavior of citizens of even reasonably just states, the main claim of philosophical anarchism is that a citizen should give no weight to a directive's status as law—she should not consider it authoritative—but should decide whether to conform with it on independent moral grounds. And so, Simmons argues, "the practical recommendations of philosophical anarchism will converge with those of defenders of political obligation wherever legally required conduct is independently required or recommended by moral considerations."[84] Among these moral considerations

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[80] I will argue against this part of Simmons' view in Chapters III and IV by arguing that, even without political obligation, citizens will still have both political duties of fairness and political duties of justice.
[81] Simmons (1993), 264.
[82] See Senor (1987).
[83] Simmons (1987), 269, 275.
[84] Simmons (2001), 118.

will be that some act is: (a) *malum in se* (e.g., rape or murder); (b) a "wrong of coordination"; (c) contrary to the reasonable expectations of others; or (d) inconsistent with natural duty to support, when not too burdensome, just or otherwise good, even if illegitimate, governments.[85]

Indeed, a large number of laws, he thinks, consist simply in "formalizations" of independent moral duties,[86] and so, for these laws, the philosophical anarchist and the defender of political obligation will agree on what a citizen ought to do—she ought to do what the law says to do—and they will disagree only on why. Where they will disagree about what a citizen has a duty to do, Simmons argues, will be with regard to "specifically political duties" (e.g., taxation and conscription) and "unnecessarily restrictive laws" (e.g., restrictions on drug use and consensual sexual acts).[87] And, even with regard to these areas of disagreement, the philosophical anarchist will often recommend that the citizen do as the law directs, for various reasons—prudential and/or moral—that do not themselves amount to duties.[88] And so, the practical implications of anarchism for everyday social life will not appear sufficiently troubling to justify its rejection.

As I will argue in detail in Chapter IV, the problem with Simmons' view here is that it does not recognize that questions of what conduct is required, prohibited or recommended by moral considerations are questions that require politics: citizens, reasoning well and in good faith about these questions, will inevitably and reasonably disagree about what conduct is required, prohibited or recommended, and it is because such reasonable

[85] Simmons (1987), 276, 278, and (2001), 110.
[86] Simmons (2001), 114.
[87] Simmons (1987), 279. See also Simmons (1987), 115.
[88] The extent to which the state of nature is 'socialized', as Simmons puts it, will determine how often the anarchist makes this judgment.

disagreement is inevitable that their interactions must be governed by laws. Because even reasonable people, deliberating individually or collectively, will not agree on the boundaries of people's rights and duties, they will confront situations in a state of nature where their rights are in dispute but where there is no way to resolve these disputes and secure their rights that respects all as free and equal. In a state of nature in which each person has the right to do what seems right to him, what seems to one reasonable person to be the assertion of her own rights as a free person will seem to another reasonable person to be the violation of his rights as a free person, and each will reasonably claim the right to defend her own rights, coercively if necessary. The point of governance by authoritative law is to avoid these sorts of freedom-endangering disputes by providing one common and authoritative view about citizens' rights and duties, enabling them to live together as free and equal persons. Simmons' claims about the practical implications of philosophical anarchism miss this important point about law and reasonable disagreement.

In this way, the implication of Simmons' view that is troubling concerns the attitude that it implies the citizen ought to take towards the result of genuine democratic governance in a reasonably just state, particularly to those results with which she reasonably disagrees: So long as she has not consented to being bound by the results of such governance, these results will be, at best a nuisance—since they will determine the actions of those around her—and, at worst, an unjust infringement on her freedom—since the state apparatus uses its coercive power to force her to abide by them. But, as I will argue, the proper attitude for her to take is one of *respect*. Whether or not the laws are in fact the correct ones from the perspective of justice, they are

legitimate law: they are worthy of being upheld as part of her community's best (and reasonable) attempt so far to create a community of free and equal citizens.

III. FAIRNESS, POLITICAL DUTIES AND POLITICAL OBLIGATION

Before getting to this democratic account of political obligation in Chapter IV, we first must consider what has arguably been the most prominent liberal account of political obligation in recent years: the fairness (or, fair play) account.[1] This account, in its most general form, holds that citizens of a reasonably just state have a duty to uphold the law because failing to uphold the law takes unfair advantage of those fellow citizens who do uphold it. H.L.A. Hart presented what is arguably the first clear formulation of a principle of fairness—or what he calls "mutuality of restrictions"—in his "Are There Any Natural Rights?"

> When a number of persons conduct any joint enterprise according to rules and this restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.[2]

The thought here is that to benefit from a cooperative scheme sustained by the sacrifices of others without sharing in those sacrifices is objectionable because doing so is unfair to those others. Hart also claims that it is this principle, and not consent, that grounds citizens' duties to uphold the law.

In his "Legal Obligation and the Duty of Fair Play," John Rawls develops this political argument: A reasonably just democracy is a cooperative scheme providing the benefits of the rule of law to citizens by means of their

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[1] For discussion, see, for example: Richard Arneson's "The Principle of Fairness and Free-Rider Problems" (1982); Richard Dagger's *Civic Virtues* (1997); Ronald Dworkin's *Law's Empire* (1986); Kent Greenawalt's *Conflicts of Law and Morality* (1987); H.L.A. Hart's "Are There Any Natural Rights?" (1955); Gregory Kavka's *Hobbesian Moral and Political Theory* (1986); George Klosko's *The Principle of Fairness and Political Obligation* (1992) and *Political Obligations* (2005); Robert Nozick's *Anarchy, State and Utopia* (1974); John Rawls' "Legal Obligation and the Duty of Fair Play" (1999c) and *A Theory of Justice* (1999d); A. John Simmons' *Moral Principles and Political Obligation* (1979), *On the Edge of Anarchy* (1993) and *Justification and Legitimacy* (2001); and Philip Soper's *The Ethics of Deference* (2002).

[2] Hart (1955), 185-6.

fellow citizens' submission to that law. Although achieving the rule of law does not require that everyone uphold all the laws all the time, to fail to do so when advantageous would be unfair to those citizens who do uphold them.[3] On this argument, then, citizens have a duty of fairness, owed to their fellows, to uphold the law.[4]

Though much has been written since on the prospects for a fairness account for political obligation, a defensible version of the principle has yet to be formulated. Robert Nozick and A. John Simmons have both rightly worried about the effect on a person's freedom of the ability of a duty of fairness to support cooperative schemes that benefit her to be generated solely by *other's* decisions. Their worries suggest that a defensible formulation of the principle must be adequately responsive to the person's interests in the exercise of choice, particularly when that choice contributes to her control over her own life. But this concern about freedom and choice, I argue, cuts both ways. The participants in a scheme also have interests in exercising choice, and it seems that, so long as their scheme does not otherwise infringe on others' rights, it merits respect from non-participants as the product of the participants' coordinated exercise of choice. In what follows, I offer a new formulation of the principle of fairness that is adequately responsive to the interests in exercising choice of both participants and non-participants. And, I argue that, while the critics are right that the various fairness accounts on offer all fail as accounts of political obligation, the account's structure makes it well-

[3] Rawls (1999c), 123.

[4] Simmons notes two ways a fairness account of political obligation may seem initially attractive. First, it avoids the problems faced by accounts that require that a citizen *consent* to an obligation to uphold the law in order to be so obligated; but it does not hold that a citizen is obligated simply because she was born in the state. Second, the account focuses attention on the citizen's relationship with her fellows, thereby highlighting how much the benefits the state provides depend on the acquiescence of her fellows. See Simmons (2001), 10.

suited to justify several of a citizen's important political duties.

As I discussed in Chapter I, the distinction between narrow and broad political obligation—or, between political obligation and political duties—is easily overlooked, resulting in the mistaken assumption that, unless citizens have duties to uphold the law, they will lack any moral ties to each other *qua* citizens. This assumption is problematic, for it forces on us a false dilemma: either we find a solution to the problem of political obligation or we conclude, as philosophical anarchists do, that (most) citizens of even a reasonably just state lack any non-voluntary political duties and so actually live in a complex Lockean state of nature.[5] Though this work concerns mainly narrow political obligation, an important aim in this chapter is primarily to pursue questions of broad political obligation. I aim to show that, even if citizens of a reasonably just state lack duties to uphold the law, they will not thereby be in a complete state of nature with each other because they will still have other important political duties towards each other generated by aspects of their shared *de facto* citizenship. In other words, my argument is that citizens can have special ties of fairness towards each other *qua* citizens even without that special tie that is the duty to uphold the law.

1. KLOSKO ON THE PRINCIPLE OF FAIRNESS

George Klosko has developed arguably the most sophisticated defense

[5] For a discussion of philosophical anarchism generally and its varieties, see Simmons' "Philosophical Anarchism" in Simmons (2001). There, he characterizes "the minimum moral content" of philosophical anarchism as the claim "that there are no general political obligations, that all (or, at least, virtually all) subjects of all states are at moral liberty to… treat laws as non-binding and governments as non-authoritative" (Simmons (2001), 107). He makes the anarchist denial of all political duties explicit elsewhere: "[P]olitical relationships among persons are morally legitimate only when they are the product of voluntary, morally significant acts by all parties" (Simmons (1993), 36). And, "the political obligations [really, duties] of citizens can be grounded only in the voluntary transfer of rights from citizen to government" (Simmons (1981), 19).

of a fairness account of political obligation first in his *The Principle of Fairness and Political Obligation* and recently extended in his *Political Obligations*.[6] Klosko accepts what I will call *the mere receipt version* of the principle of fairness, and he argues that it can ground political obligation. On this version, a person's receipt of a good from a cooperative scheme is enough to generate for her a duty to bear her share of the burden of providing that good.[7]

In *Anarchy, State and Utopia*, Robert Nozick offers what is now a well-known counterexample to the mere receipt version of the principle of fairness.[8] Call it *Public Address System*:

> Suppose members of Streett's 365-person neighborhood decide to set up a cooperative venture to provide entertainment using a dormant public address system. Each person is assigned one day a year to provide the entertainment. Streett has benefited from it (and will likely continue to do so), since she has enjoyed a fair amount of music and funny stories. Now, when her turn comes up after 138 days, is Streett obligated to do her day?[9]

Nozick says that she clearly is not and that, since the mere receipt version

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[6] In *Political Obligations*, Klosko expands his account into what he calls a "multiple principle" account of political obligation that uses other principles in addition to the principle of fairness as grounds for a complete account of political obligation. But this expanded account is a result of Klosko's defense of the main arguments in *The Principle of Fairness*, and the principle of fairness remains the basis for this expanded theory, even as it includes other principles to 'fill the gaps.' See Klosko (2005), 1, 105. My arguments against fairness accounts of political obligation are not directed against its inability to fill these gaps.

[7] The mere receipt version, as with any plausible version of the principle of fairness, requires that the person provided with a good benefit from that provision: the good provided must be worth the cost of her share of the burdens required to provide it. My discussions of different versions of the principle assume that the they all include this benefit requirement.

[8] Nozick mistakenly interprets Rawls as defending the mere receipt version of the principle.

[9] Nozick (1974), 93-4 (The person's name is my own addition). That the scheme *assigns* each person a share of the burden is a complication that I intend to ignore in what follows, for it raises important questions about procedures for arriving at public determinations of persons' fairness duties, questions I only take up at the end. Also, Nozick's case is only a counterexample to the principle if we assume that the share assigned corresponds with the share that fairness requires. In what follows, I assume that the public address scheme gets the distribution of burdens right: each person's share of the burdens is in line with her share of the benefits received.

holds that she is, it must be rejected.[10]

On Nozick's view, persons cannot come to have obligations simply because others decide to benefit them in certain ways, particularly if they would have preferred not being benefited in those ways.[11] Because a person's freedom—her ability to exercise control over the conduct of her own life—is of independent (and trumping) value, others may not limit her ability by setting up some beneficial scheme that obligates her and thereby constrains her permissible options.[12] I find Nozick's concern here about freedom an important one—there is something objectionable about a duty of fairness generated solely by others' decisions to benefit you—and it does justify rejecting the mere receipt version of the principle of fairness.

In *The Principle of Fairness*, Klosko observes that Nozick's counterexamples, including Public Address System, "concern the provision of

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[10] Nozick's brief discussion of the principle of fairness is quite complex, addressing not only the principle itself but also whether any duties it generates would be enforceable. He offers several objections to the principle itself—What is the good is not worth the cost? Why distribute the burdens equally if the benefits are not distributed equally?—that are easily accommodated, even on the mere receipt version, by requiring that the person benefit (as Nozick admits) and that the burdens be distributed to persons in proportion to the benefits they receive. The objection that I focus on here is not so easily accommodated by the mere receipt version of the principle. For Nozick's discussion, see Nozick (1974), 90-95.

[11] Simply because a good counts as a benefit does not mean that a person does or should want it. A person may not prefer being provided with some good even though it counts as a genuine benefit for her. Even if the good is worth her share of the burdens, she may have other reasons for preferring not to be benefited in that way. She may prefer that she not be associated with certain people or that she be self-reliant. An inability to fulfill these preferences cannot simply be included in the benefit calculation for the good in question as costs or burdens, for these preferences have to do with whether she wants to be bound to the scheme by a duty of fairness. If they were included, she would be able to avoid having a duty of fairness by preferring not to have it. Most discussions of paternalism find instances of paternalism objectionable even when they do benefit the person in question.

[12] By control over the conduct of one's life I mean not only control over one's actions but also control over the content of one's commitments, obligations and projects. The idea is similar to Joseph Raz's understanding of autonomy as part authorship of one's own life. See Raz (1986), 369-399. On Nozick's view, how the imposition is done—here, by the provision of benefits—is irrelevant. What is relevant is the imposition itself: apart from a skeletal system of natural rights and duties, *all* valid obligations derive from consent. As T.M. Scanlon observes, "In Nozick's conception, the primary threat to liberty is the imposition of obligations to which one has not consented" (Scanlon (1976), 15). I am only concerned here with a freedom worry directed specifically against duties of fairness.

goods that are of relatively little value."[13] And, he argues, the force of Nozick's argument depends, in large part, on this feature of the goods. On Klosko's view, mere receipt of a good does generate duties of fairness when the good in question is both a public good and "presumptively beneficial." A good is a public good when, in order to be provided to anyone, it must be provided to all.[14] And, as Klosko explains, "what characterizes [presumptively beneficial] goods is indispensability: they are necessary for an acceptable life for all members of the community."[15] Because of the contributions these "presumptive goods" make to a person's welfare, her mere receipt of them will generate for her duties of fairness.

Now, one might expect Klosko to agree with Nozick when it comes to schemes providing goods that, though desirable, are not indispensable. (Klosko calls them "discretionary goods.")[16] On this view, when a good is discretionary, there is something objectionable about a person's permissible options being restricted by a duty of fairness generated solely by others' decisions.[17] And so, on this view, the distinction between presumptive and discretionary goods carves out a class of goods—the presumptive ones—against which Nozick's freedom objection is unsuccessful.

This seems not to be Klosko's view, however. Consider what he says about Public Address System: "It seems to me that if a given noncooperator benefits from Nozick's public address scheme, she does have an obligation to

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[13] Klosko (1992), 39. See also Klosko (2005), 6.
[14] Or, to be precise, a public good must be provided to everyone falling within its range or sphere of distribution in order to be provided to anyone. For more on public goods, see Simmons (2001), 18; Rawls (1999d), 235-6; and Klosko (1992), 36.
[15] Klosko (1992), 39.
[16] Klosko (1992), 44.
[17] It does seem at times that this is Klosko's view. Consider: "[T]here is something inherently questionable about restricting an person's liberty in order to give her something she could easily do without, even if the benefits of receiving such goods outweigh the burdens of helping to provide them" (Klosko (1992), 44).

contribute. If she listens frequently or regularly, it would be wrong of her not to make some contribution."[18] Though the good here is discretionary, Streett *does* have a duty of fairness if she listens regularly, a duty whose force depends on the extent of the benefit she receives. And so, he rejects Nozick's freedom objection, even when it is restricted to mere receipt of discretionary goods. On Klosko's view, then, the receipt of a good—whether discretionary or presumptive—is sufficient to generate a duty of fairness.

Klosko's distinction between presumptive and discretionary goods seems better suited to answer the distinctly political question of whose judgment of the content of a person's fairness duty has authority: when a good is discretionary, that person's judgment has authority; when a good is presumptive, it does not. What is important about discretionary goods is that, when a good is discretionary, the content of the person's fairness duty is *uncertain*: Streett, Klosko argues, "can easily *say* that she prefers the not to receive the benefits," and her neighbors are in no position to dispute her because "it is not clear exactly what this obligation [of fairness] commits her to."[19] And, because her duty is uncertain, it does not override what Klosko calls "her usual liberty to decide for herself the burdens she will bear."[20] Since the good in question is discretionary, Streett must be the one to determine what, if anything, she owes: her judgment has authority.[21] Duties deriving from the receipt of a presumptive good, on the other hand, override the person's liberty to decide for herself what she owes, for when the good is presumptive, the fairness duty is sufficiently certain that others may demand

[18] Klosko (1992), 44.
[19] Klosko (1992), 44. Italics in first quotation added.
[20] Klosko (1992), 44.
[21] As Klosko puts it, "[u]nder these circumstances it seems clear that the noncooperator [Streett] herself must be the judge of what she owes" (Klosko (1992), 44.

its fulfillment.[22]

It is not clear, however, what Klosko means here by 'the usual liberty to decide for oneself'. There seem to me at least three different ways to understand this 'liberty.'

Perhaps he means that Streett's duty in Public Address System is an imperfect duty. On this reading, because the good is discretionary, Streett has a certain amount of freedom to decide how she will fulfill the duty by choosing the specific burdens she will bear.[23] When a good is presumptive, then, the fairness duty is a perfect duty: the person must bear specified burdens. This reading, however, is implausible. First, Klosko allows that Streett could permissibly decide to contribute nothing, a decision that is impermissible on this reading, for, while an imperfect duty allows some latitude in deciding how to fulfill the duty, it does not allow outright refusal to fulfill it. Second, imperfect duties are not, as this reading suggests, simply uncertain perfect duties: it is not that the person, because of her lack of information, *thinks* she has options but that she actually has such options.

Perhaps Klosko is instead distinguishing between what is merely distastefully unfair and what is outrageously unfair.[24] On this reading,

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[22] There remains some difficulty in interpreting Klosko here. Consider his example of Blue and Gold: they share a sidewalk and so share a duty to shovel it when it snows. Klosko does say that Gold has a duty of fairness to help Blue shovel, even if Gold thinks that he does not. And so, Klosko seems to accept the mere receipt version of the principle. He goes on to say that this fairness duty is not strong enough, the benefits not substantial enough, to justify allowing anyone else (Blue, for instance) to make the judgment of what Gold's duty requires of him: "because the benefits in question are not of great value, it is not clear what they commit Gold to, and it seems that he himself must be the judge of this." But Klosko concludes from this that "Gold would not be behaving unfairly in refusing to help." And this implies a rejection of the mere receipt version. The problem is regardless of whether Gold can plausibly *say* that he does not have a duty of fairness—regardless of whether "he has a ready defense for his failure to help Blue at all if he does not wish to"—he may still act unfairly in refusing to help. See Klosko (1992), 44-5.

[23] The duty of charity or aid can plausibly be understood as an imperfect duty.

[24] I thank Sara Street for bringing this interpretive possibility to my attention.

Klosko's claim is that it is outrageously unfair to receive indispensable benefits without bearing your fair share of the burdens and only distastefully unfair to receive discretionary benefits without doing so. This liberty to decide for oneself, then, is a right to be free from coercion: When a person is only being distastefully unfair, her right to freedom from coercion defeats the claims others might have to enforce her fairness duty; but, when she is being outrageously unfair, others' claims to enforce her duty defeat her right to freedom from coercion. While this reading avoids the problems with the first reading, it does not capture what Klosko seems to be after with the notion of 'a liberty to decide.' He discusses the criteria for justified coercive enforcement elsewhere, separately from his discussion of this 'liberty to decide.'[25] And so, while the fact that a good is presumptive (and the fairness duty certain) will undoubtedly be relevant for justifying enforcement, it is not sufficient to justify it on Klosko's view.

If it is not an appeal to an imperfect duty or a right to freedom from coercion, it seems misleading to speak of a 'liberty' to decide for oneself, for doing so suggests the person has some freedom—freedom of choice or freedom from interference—to tailor her fulfillment of the duty in light of her own projects. To have this liberty to decide seems instead to amount to having the standing or authority to determine for oneself and for others what one's duty requires. On this reading, the claim is that the duty-bearer's own determination of what her duty requires of her has standing, which others' determinations lack, as authoritative for them all.[26] If Streett determines that

[25] For Klosko's discussion of coercive enforcement of duties of fairness and how it might be justified, see Klosko (1992), 46-8.
[26] And so, on this reading, what her duty actually requires is independent of her determination of what it requires, and so her determination can be correct or incorrect. This reading makes sense of Klosko's claim that Streett may have a duty of fairness but that, if she decides that she does not, others cannot hold her to the duty.

she has no duty at all or that the duty requires little of her, the others must accept her determination as one they must abide by when interacting with her, whether or not they agree with her (and whether or not her determination is correct).[27] On this reading, the liberty at stake is the ability to live according to one's own judgments of moral questions, even those whose answers are uncertain, by having others with whom one interacts abide by them.

This reading makes sense of the primarily epistemic role that a good's status as presumptively beneficial plays in Klosko's account. Consider: "If a given benefit is indispensable to A's welfare… then *we can assume* that he benefits from it, even if he has not sought to attain it."[28] And: "[B]ecause the benefits of national defense are presumptively beneficial, *we can presume* that Pickerel *would* pursue them (and bear the associated costs) if this were necessary for their receipt."[29] When a good is a presumptive good, a person cannot plausibly claim that he does not need the good and so cannot convincingly claim that he refuses to cooperate because, say, the good is not worth the cost or because he does not want it.[30] His refusal to cooperate only admits, according to Klosko, of one interpretation in such cases: it "must be interpreted simply as a desire to profit from their labor without doing his fair share, and so a clear instance of free-riding."[31] There is no worry, then, about

[27] Whether they disagree with her judgment and whether her judgment is correct are both irrelevant to whether they are to act according to it. That these are irrelevant are hallmarks of the judgment's possession of authority. For a concise account of authority, see Section 6 of John Gardner and Timothy Macklem's "Reasons" (2002).
[28] Klosko (1992), 39. Italics added.
[29] Klosko (1992), 42. First italics added. Klosko says similar things in *Political Obligations*: "[I]f a given benefit is indispensable to Smith's welfare… then we can assume that she benefits from it, even if she has not sought to attain it." And, "[b]ecause the benefits of national defense are indispensable, we can presume that Grey *would* pursue them (and bear the associated costs) if this were necessary for their receipt." (Klosko (2005), 6, 7)
[30] Because presumptive goods are goods that are necessary for acceptable lives, we can assume that persons want them no matter what else they want.
[31] Klosko (1992), 42.

his liberty to decide in these cases, for the duty is not uncertain. For presumptive goods, then, the others may demand that he bear that share without infringing on his usual liberty to decide for himself.[32]

The problem, however, is that showing with certainty that a person benefits from a scheme without sharing in the burdens is not yet to show that she is thereby doing something unfair. And Nozick's argument is directed against this latter claim. Granted, once we have shown when benefiting from a scheme without sharing in the burdens *is* unfair, establishing with certainty that a person is so benefiting will be an important task. But, we must first show when benefiting without sharing in the burdens is unfair by formulating a defensible version of the principle of fairness, and, to do so, we must defend it specifically against freedom-based worries such as Nozick's. Klosko's account does not do this but instead simply assumes the mere receipt version. My aim in what follows is to defend a distinctive version of the principle of fairness against such freedom-based worries.

2. THE PRINCIPLE OF FAIRNESS

Nozick is right to worry about the effect on a person's freedom of a duty—one that is generated solely by the decisions of others but that applies to her—to support a cooperative scheme that benefits her. A defensible principle of fairness must be adequately responsive to our interests in

[32] Since presumptive goods are necessary for acceptable lives, a fairness account might try to emphasize their importance, not for the duty-bearer, but for the others who benefit from the scheme by receiving such a good. Klosko, at times, seems to suggest that the needs of others to be provided with a presumptive good can play a role in establishing that a person has a fairness duty to share in the burdens of providing that good. As Simmons argues, however, appealing to the significance of the good, not to the duty-bearer, but to others in order to establish that she has a duty to support the scheme is not to appeal to fairness in the way that concerns the principle of fairness. See Simmons (2001), 35. As I note later, the indispensability of some presumptive good to others, even though it cannot give someone a *fairness* duty to share in the burdens of the scheme, will give her a strong duty not to interfere with the scheme and so with the good faith efforts of those charged with operating it.

exercising choice, particularly when that choice contributes to our control over our own lives. While I agree with Nozick that the mere receipt version is not adequately responsive to bystanders' interests in exercising choice, I argue that his consent version of the principle fails to be adequately responsive to the cooperators' interests. I argue also that A. John Simmons' voluntary acceptance version of the principle, which is motivated by a concern for freedom similar to Nozick's, is also not a defensible version of the principle. I argue instead that my version of the principle is adequately responsive to the interests in exercising choice of both bystanders and cooperators. The value of individual freedom and choice, properly understood, does not undermine the case for a robust principle of fairness, but actually supports it.

2.1 Justified Reliance

I call my version of the principle of fairness *Justified Reliance* (*JR*):

> Absent special justification, it is impermissible to rely on the receipt of benefits from some scheme for the pursuit of one's own good, benefits that are the same as the benefits others receive from that same scheme, without also sharing proportionally in the burdens those others bear or the sacrifices those others make by their participation in the scheme in order to provide those benefits.[33]

What is meant here by 'reliance' on benefits? I intend 'reliance' on a benefit to contrast with both mere receipt and voluntary acceptance of a benefit, and so it is meant to pick out the relation a person has to the scheme providing the benefit that explains when concerns of fairness arise from her receipt of the

[33] My version is formulated in terms of what it is impermissible for one to do, absent some special justification. Its aim is to get the equivalent of a claim about a relatively strong *prima facie* duty. The claim that one has a *prima facie* duty to do *x* is the claim that, under normal circumstances, one has a duty to do *x* but that, under special circumstances, that duty can be overridden or cancelled by other, special reasons. The duties of fairness that this principle finds are such duties. For instance, the fairness duty to share in the burdens of some scheme is cancelled when the participants give you the benefits of that scheme as a gift.

benefit.[34] Basically, this notion of reliance seems to me to capture better the intuitions about when it is unfair to take advantage of others' sacrifices.

Here are several preliminary characterizations of 'reliance': A person relies on a benefit by using it as a means towards some end. Or, she relies on it by incorporating its use into her plan: it becomes a component of the plan and, to that extent, she relies on the benefit when carrying out the plan. Another way of putting the thought is that she relies on a benefit when its presence, availability or use is a nontrivial premise in some practical argument.[35] Also, she relies on a benefit when its availability is an enabling background condition of her actions or plans.[36] Importantly, taking advantage of a good by relying on it does not require that one knowingly and willingly accept that good, only that the good in question play a certain role in one's plans. Though still somewhat obscure, I hope this characterization points to a relevantly distinct way of receiving benefits.[37]

Consider the following example, which we will call *Quiet Neighborhood*,

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[34] To use Simmons' terminology, relying on a benefit makes a person an 'insider' to the scheme—she has duties of fairness to support the scheme—while, by merely receiving benefits, she remains an 'outsider.' For the distinction between beneficiaries who are 'insiders' and those who are 'outsiders,' see Simmons (2001), 4-6.

[35] I do not intend these formulations to be strictly equivalent but rather to be getting at roughly the same idea.

[36] For example, the ready access to healthcare that I have as a U.S. resident with health insurance is a benefit I rely on, and it is so even if I do not ever need to go to a hospital or require the services of a doctor: I do certain things and take certain risks regularly in the pursuit of my various ends that I would not if I did not have this ready access to healthcare (and this is true whether or not I realize it). And so, this access is an enabling background condition of many of my actions and plans.

[37] I do not think that we can understand 'relying on a good' as 'being such that one would consent to its availability (along with the attendant duty) were one placed in the relevant choice situation.' The problem with going this hypothetical consent route is that, while it may be true that a person would, in the right choice situation, consent to the availability of every good upon which she does actually rely, it does not seem true that a person relies on every good to which she would offer her consent. In other words, it seems to me that the fact that a person does actually rely on the good explains her hypothetical consent in those cases, not the other way around. David Estlund suggested in conversation that hypothetical consent may be a possible way to understand reliance.

for it should help motivate the Justified Reliance version of the principle of fairness:

> Suppose Baltazar's neighbors decide, but without him, to be much quieter in their backyards than generally expected so that they all may enjoy peace and quiet in their backyards. Baltazar loves devoting many hours building intricate models of Civil War battles, replete with miniature trees, soldiers, cannons, horses and the like. The work is very detail-oriented, requiring concentration and so an unusual amount of silence; also, it is best done outdoors in natural light, for that is how he knows he's gotten the colors right. If Baltazar builds his models in his backyard but does so because the neighborhood is reliably and especially quiet (as a result of his neighbors' scheme), would it be unfair for him to relax later by listening to Wagner's "Ride of the Valkyries" in his backyard at what would otherwise be a reasonable volume?

I am inclined to say that it would be unfair, for Baltazar has relied on the good the neighbors' scheme provides to them all. He is able to do his work only because the neighborhood is reliably and especially quiet; and so, his success at this valued and engrossing hobby depends partly on the benefits provided by their scheme.[38] Playing Wagner, which would otherwise be permissible, thus counts as unfair: it is the kind of activity his neighbors refrain from for the sake of the scheme, and, as someone who relies on the good the scheme provides, Baltazar ought to refrain in the same way. Baltazar's reliance, coupled with his listening to Wagner, counts as taking unfair advantage of others to further his own ends.[39]

Now, someone might object to this result on the grounds that it surely

[38] Notice that Baltazar might still receive benefits from this scheme without relying on those benefits. For instance, the ready access to reliable quiet outdoors plausibly counts as a benefit for him even if this access does not matter to how he pursues his model-making. Because he does not rely on this access to quiet, he will not have a duty of fairness to help maintain the scheme.

[39] Were Baltazar not to rely on the quiet, his listening to Wagner would not be unfair. And, were he to listen to Wagner with headphones, his reliance on the scheme would not count as unfairly taking advantage of it.

matters whether Baltazar's neighbors gave him the opportunity to give or refuse his consent to the scheme. Why, the objector asks, should Baltazar come to have a duty of fairness here if his neighbors had the chance to get his consent beforehand—which they almost certainly did—and neglected to do so? I agree that would-be cooperators often ought to try to get the consent of those possibly affected by a scheme, but not because their consent is required for them to acquire duties of fairness.[40] It is required, when it is, in order for their duties of fairness to be properly enforceable.[41] If consent is not required to generate a duty of fairness, what does *JR* say about Public Address System? According to *JR*, Streett may have a fairness duty to support her neighbors' public entertainment scheme. But whether she does depends not on whether she has consented to the scheme or received benefits from it but rather on whether she relies on the entertainment it provides or just happens to enjoy some of it when she's around her house.[42]

2.2 Moral principles and reasonable rejection

I have formulated *JR* as the sort of moral principle used in T.M. Scanlon's contractualist account of morality: it is a general conclusion about the status of various kinds of reasons for action—here, reasons of fairness—and, as such, it may not hold in some cases.[43] Just as with a *prima*

[40] I defend this claim that consent is unnecessary for generating duties of fairness in a later section.
[41] I address this connection between consent and enforceability in detail in Section 3 of this chapter.
[42] In this way, Klosko is right to think that Streett will likely have a duty of fairness in Public Address System if she 'listens regularly' to the broadcasts, for in that case it is likely that she is relying on the broadcasts. Consider a similar, real-life example: One person gets her news from her local NPR station while another listens every so often while perusing the radio dial. The relevant difference between the two—the difference that explains why only the former seems intuitively to have a duty to contribute to the station's annual fund drive—is that the former is relying on NPR while the latter is not.
[43] And so, the claim is that relying on a benefit from some scheme—using it to one's advantage—*normally* requires that one share in the burdens of providing that benefit.

facie duty, one must still use judgment when applying the principle to cases in order to see, say, whether there is any special justification to override the principle's claim or to exclude the reasons with which the principle is concerned.[44] For instance, that some benefit was provided as a gift is a reason for excluding reasons of fairness from your deliberations about the situation, for the fact of gift-giving changes the situation such that considerations of fairness are inapplicable. On Scanlon's view, justifying this sort of principle consists in showing it to be a principle for the regulation of conduct that no one with the same justificatory aim can reasonably reject. To show this, one takes up the standpoints of various representative individuals and asks, for each one, whether she has good grounds to reject the proposed principle.

On Scanlon's contractualist view, a wrong action's wrongness consists in its being disallowed by such a principle, and this fact that it is disallowed (and so is wrong) is what gives us conclusive reason not to do it.[45] I want to remain uncommitted here concerning more fundamental issues in moral theory, and so I do not mean to endorse this more substantive part of Scanlon's view.[46] My use of Scanlon's method of justification rests solely on the claim that reasonable-rejectability reliably tracks wrongness such that, if we can show that a principle disallowing some action is not reasonably

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[44] For more on this understanding of principles, see Scanlon (1998), 197-202.

[45] That an act is disallowed by a principle that no one can reasonably reject "provides the normative basis of the morality of right and wrong and the most general characterization of its content." (Scanlon (1998), 189)

[46] Others have objected, for instance, that Scanlon has it backwards: it is not an action's being disallowed by a principle no one can reasonably reject but rather, as Michael Ridge puts it, "the grounds on which one might reasonably reject principles allowing [the] action [that] provide all the reasons we have not to perform that action." (Ridge (2003), 338) To use the example Ridge cites, that torturing others for fun is cruel gives us both good reason to reject principles allowing it and good reason not to do it (presumably all the reason we might need). We need not suppose, as Scanlon does, that its being disallowed by such a principle gives us any additional reason not to do it. According to this objection, then, the role of principles in Scanlon's theory is otiose.

rejectable from any representative standpoint, then we have a good argument that the action is indeed wrong. I find this claim very plausible: testing principles from all representative standpoints seems to provide a particularly effective way for sorting through and picking out the morally relevant considerations at play in some situation. I use his method of justification here to argue for *JR*, then, because it is a powerful method for doing normative theorizing about particular phenomena, specifically here acts of taking advantage of the good-faith sacrifices of others.

2.3 Why a principle of fairness at all?

There is good reason to think that there is a valid version of the principle of fairness and so that persons can have duties of fairness. Consider the standpoint of would-be cooperators. Persons living in close proximity have a strong interest, stemming from their interest in exercising choice, in being able to form beneficial coordinative schemes with others when they judge them appropriate. Should some permissible end require a good provided by some ongoing scheme, their interest in achieving that end gives them an interest in establishing and maintaining the scheme. This is particularly true of public goods, for these goods are often quite important—their provision may be required if persons are to be able to exercise choice in valuable ways in the first place[47]—and persons generally cannot provide them on their own.

Now, suppose that, instead of a principle of fairness, all we have is a principle of necessity governing participation in cooperative schemes:

> A person is required to contribute to a scheme providing benefits on which she relies just in case her contribution is

[47] For example, national defense, public order and pollution control.

necessary to that scheme's stable and ongoing success.

Such a principle might seem attractive, for one should not have to sacrifice when that sacrifice is unnecessary. But it would make for highly unstable schemes. Persons would make judgments about the necessity of their sacrifice in situations of limited information and with an incentive structure promoting bias, making them quite likely to err on the side of their contributions being unnecessary. The relations of mutual trust that make successful cooperative schemes possible would be much harder to sustain under such a principle: persons would be quite interested in the possibility of permissible free-riding—they would get the benefits without bearing the burdens—and would also know that others were similarly interested. And, knowing this, they would realize that such schemes are at greater risk of being unstable (and so unsuccessful), giving them even less assurance that sharing in the schemes' burdens will pay off for them and so less reason to join such schemes. Because stably successful cooperative schemes require that persons be able to develop relations of mutual trust, the interests of would-be cooperators in being able to form and sustain such schemes give us good reason to think that there is a valid version of the principle of fairness.[48]

And consider the standpoint of would-be free riders. Their interests in free-riding seem insufficient to merit rejecting principles of fairness in favor of the principle of necessity: so long as the extent of the burden the person must

[48] Of course, this discussion is primarily a recap of standard treatments of the free-rider problem as an n-prisoner's dilemma. For such a treatment, see Rawls' discussion of the isolation and assurance problems in Rawls (1999d), 236-9. My discussion, though, has a different emphasis: the problem is not merely that certain sorts of benefits will not be provided, but that would-be cooperators will have their attempts at doing so thwarted. The emphasis, then, is on their inability to satisfy their interest in exercising choice in valuable ways. This emphasis on the cooperators' interests in freedom and exercising choice here is important, for both Nozick's and Simmons' arguments about the principle of fairness, based on claims about the value of freedom, emphasize the interests in exercising choice of those who are bystanders to the scheme but overlook the interests of the would-be cooperators.

take on is proportional to the benefit received and to the burdens of the other participants—or, the burdens of those without whose cooperation the scheme and so the benefits would not exist—it seems unreasonable to object that they are too great a price to pay, particularly since they are the price for goods the free rider wants.

2.4 Why not the mere receipt version?

But what about those who do not want the goods provided by some scheme? They seem to have a potentially strong objection to any version of the principle that, instead of regarding them as bystanders, takes them to have a duty grounded in their receipt of goods they do not actually want. For this reason, we ought to reject, with Nozick, the mere receipt version of the principle: Streett does not have a duty to do her share of the broadcasting simply because she receives the benefits of the public address system. The mere receipt version is objectionable because it gives others unjustified power to constrain what a person may do: by providing her benefits and so by imposing duties on her, they limit her permissible options.[49] The value to persons of the exercise of choice and so of control over important aspects of their lives is good reason to hold that others cannot simply create for them duties to bear burdens by providing them with some good. What we need, then, is a principle that is adequately responsive to our interests in choice, whether we are a would-be cooperator or a would-be bystander.

[49] In addition, the mere receipt version of the principle would gives would-be participants reason to distribute the benefit widely when doing so would distribute the burdens widely and so lessen the amount that they themselves must bear (and, as far as the principle is concerned, they would not have reason to consider the wishes of those other people).

2.5 Why not the consent version?

On Nozick's view, Streett does not possess a fairness duty in Public Address System because she did not *consent* to being a participant of the scheme and so she remains merely a bystander. On Nozick's *consent version* of the principle of fairness, a person is bound by a duty of fairness only once she has consented to the duty, for it is only as self-imposed that these new duties are compatible with the person's freedom.[50] In this way, the principle of fairness generates just those obligations that consent has already generated.[51]

However, from the standpoint of would-be cooperators, it seems rather burdensome to require of them that their scheme provide someone a clear choice situation such that her action in that situation—either some express declaration of consent or some action (or failure to act) that counts as tacit consent—is what determines whether she is required to share in the burdens.[52] And, in cases of public goods, to provide such a choice situation would be, in effect, to allow the person to decide herself whether to make her potential free riding permissible or impermissible. She would have little reason to decide to make it impermissible, unless doing so were necessary for the scheme's success.[53] In this way, the consent version faces the same difficulties

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[50] Nozick (1974), 95; Simmons (2001), 15. Consenting to be a participant requires consenting to the duties of a participant.

[51] On Nozick's view, then, there is no freestanding fairness account of political obligation: a person will have a fairness duty to uphold the law only if she consents to have it by consenting to be a participant.

[52] What counts as tacit consent? As Simmons makes clear, the difference between express and tacit consent lies merely in the manner in which the consent is publicly expressed to others. Express consent is consent given, say, by uttering the phrases "I consent to…" or "I agree to…", or by acting in some other way that conventionally signifies expressing consent, for instance, by raising one's hand, nodding one's head 'yes,' or signing one's name to a contract. Tacit consent, by contrast, is consent given by remaining silent or inactive or by a failure to do some particular thing(s) in the relevant situation. Despite this difference, Simmons emphasizes, "tacit consent is nonetheless given or expressed." The distinction, then, lies simply in the manner in which the consent is publicly given—consent by action vs. consent by inaction—not in its significance or bindingness. See Simmons (1979), 80.

[53] If she were to judge doing so necessary for the scheme's success, then her benefiting from the scheme would give her a duty of fairness to share in the benefits. But, it is important to

concerning scheme stability and the cooperators' interests in exercising choice that motivated the rejection of a principle of necessity in favor of the principle of fairness.

2.6 Why not the voluntary acceptance version?

In *A Theory of Justice*, Rawls rejects his earlier fairness account of political obligation, but not for Nozick's reasons. On Rawls' view, to have a fairness duty, one must have "voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests."[54] Call Rawls' version of the principle the *voluntary acceptance version*: An person's benefiting from a cooperative scheme generates for her duties of fairness to support those schemes just in case she has voluntarily accepted those benefits.[55] But, he observes, since membership in a state is normally nonvoluntary, political obligation cannot be based on the principle of fairness.[56]

In "The Principle of Fair Play" and "Fair Play and Political Obligation," A. John Simmons defends both the voluntary acceptance version of the principle and Rawls' rejection of fairness accounts of political obligation. To count as voluntarily accepting a benefit, on Simmons' view, a person must either "(1) have tried to get (and succeeded in getting) the benefit, or (2) must have taken the benefit willingly and knowingly."[57] The first way of accepting a benefit concerns excludable or avoidable goods, which are those goods

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notice that, if these benefits are particularly valuable to the others, she would also have a separate, non-fairness duty to share in the burdens.

[54] Rawls (1999d), 96. See also Rawls (1999d), 301-308.

[55] You might also put the voluntary acceptance version another way: a person's voluntary acceptance of a good makes her a participant the scheme in Nozick's sense, and so consent is not required for someone to become a participant.

[56] Rawls does argue that the principle of fairness can ground the political duties officials assume on taking office. See Rawls (1999d), 97.

[57] Simmons (2001), 18.

whose provision can easily be restricted to selected persons. Simmons' example is of a cooperatively dug and maintained well: even someone who refused her consent to the scheme generates for herself a duty of fairness to help maintain it when she sneaks to the well at night and retrieves water from it because, by doing so, she voluntarily accepts the benefits of fresh water provided by the well.[58] As is apparent with this example, voluntary acceptance of an excludable good is fairly straightforward, for you must actually *do* something in order to get it.[59]

Consider public goods, for they are both non-excludable and unavoidable. Since those who receive these goods cannot avoid doing so, they need not do anything to get them. Whether persons can nevertheless count as voluntarily accepting public goods is crucial, for many of the important goods provided by the state are public goods. Simmons argues that a person can voluntarily accept public goods—she can take them 'willingly and knowingly'—by having "the requisite belief and preference structure" while unavoidably receiving the benefits.[60] For instance, she must not think the benefits forced on her nor worth less than the price to be paid, and she must know how the benefits are provided.[61] For Simmons, the unavoidable receipt of a public good counts as voluntary acceptance just in case the recipient has certain beliefs and preferences about these goods.

Like Nozick's consent requirement for a fairness duty, Simmons' belief-and-preference requirement seems motivated by the claim that new

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[58] Simmons (2001), 16-7.
[59] Simmons (2001), 19.
[60] Simmons admits that this sort of voluntary acceptance of such benefits is "not at all the normal state" (Simmons (2001), 20).
[61] Simmons (2001), 20. And so, one of the things she must know is that the benefits are provided by a cooperative scheme. For additional discussion of the criteria for voluntary acceptance of public goods, see Simmons (1993), 252-7.

obligations cannot simply be created for a person by others deciding to benefit her, for such a creation of obligations would objectionably infringe her freedom by limiting her permissible options.[62] And this might seem quite plausible, for it certainly matters for our judgments about the fairness of advantage-taking whether, say, the person knows that she is receiving some benefit from a cooperative scheme.[63] If she could come to have a duty of fairness by unknowingly benefiting from some scheme, the thought goes, this duty would be *imposed* on her. In this way, such a person has good reason to reject any principle that finds her with such a duty.

JR seems unconcerned with the attitudes of the person who is relying, for it holds that she has a duty regardless of whether she knows that she is taking advantage of others by relying on some good. And so, *JR* seems vulnerable to this imposition objection. Surely, the worry goes, our interest in the exercise of choice justifies holding that a person's non-culpable ignorance of some benefit absolves her of a fairness duty to help provide it. In this way, the unknowing relier seems to have good reason to reject *JR* in favor of the voluntary acceptance version.

However, Simmons' voluntary acceptance version is implausible for public goods. To see why, consider first the case of promising. Normally, a person is not required to do what she promises to do until she actually

[62] Simmons calls his version of the principle of fairness a 'voluntarist' version (Simmons (2001), 27 and Simmons (1993), 256). For Simmons, the basis of a voluntarist view is the idea that "the course our lives take should be determined as fully as possible by our own voluntary choices" (Simmons (1993), 37), and so the basic claim is that "all persons… begin their moral lives… with a substantial body of moral rights and duties and… the rights in question centrally include, and perhaps add up to no more than, a broad right of self-government or independence (both from other persons and groups and from states)" (Simmons (2001), vii.
[63] Or, if one is also concerned about cases of culpable ignorance, whether she should know that she is benefiting from a scheme.

promises to do it, for her act of promising generates the requirement.[64] It is in this way that she has the power to bind herself.[65] Simmons seems to intend voluntary acceptance to work similarly: you need not share in the burdens of a scheme until you actually voluntarily accept its benefits. In this way, you have the power to bind yourself by creating a fairness duty because you have the power to decide whether to accept the goods.

For public goods, however, the person's coming to have certain beliefs and preferences is supposed to be what generates the duty of fairness. But, unlike promising, this coming to have certain beliefs and preferences is not itself the exercise of choice: a person does not have the kind of freedom over her beliefs and preferences that she has concerning decisions, say, about whether to make a certain promise. The underlying rationale for how, by promising, she can bind herself with a new duty is unavailable as an explanation of how voluntary acceptance of public goods generates a duty of fairness. This part of Simmons' view, then, seems without basis.

Furthermore, the appeal to a voluntary acceptance condition is not the only reply available to the unknowing relier's imposition objection. Consider this example, which we'll call *Public Water System*[66]:

> Before Miller moved into his neighborhood, his neighbors restarted the old but dormant water system and created an ongoing scheme to share the burdens of upkeep. The only feasible option is to provide water to every house on the old system, including Miller's. However, Miller doesn't know that

[64] Suppose she did not in fact promise to do something and, when the time comes, you tell her that she has a duty to do it because she *would have* promised to do it. This fact does seem to me to have some force as a reason for her to do it, but not nearly the same force as her promising to do it would have.

[65] There are various ways people have thought to account for why persons have this power to create conclusive reasons that apply to themselves, but I take the claim that they have this power to be uncontroversial.

[66] I have taken certain elements of this example from one of Kent Greenawalt's examples. See Greenawalt (1987), 127.

> he is benefiting: He is either asleep or away during the day, so the neighbors' knocks on the door go unanswered, and the neighbors are all asleep when he's around at night. Also, a neighbor's dog snatches every notice they leave for Miller.[67]

Miller has not voluntarily accepted the benefits of the water system and, because of his ignorance, has no reason to think he has a duty of fairness to share in the burdens of system upkeep. A defender of *JR* can say that, in this case, Miller does have a duty of fairness on account of his unknowing reliance on the water provided by the system but that his non-culpable ignorance excuses his failure to fulfill his duty.[68] And saying this seems to me to defuse the imposition objection, since no burdens are imposed on Miller as a result of his unknowing reliance.

Simmons' account defuses it a different way: it claims that Miller does not have a duty at all, and so that his failure is not merely excused, but rather justified. However, if we go Simmons' route, we must also say that Miller's friend Kosch would lack good reason to inform him about the water supply scheme and, as his friend, would even have good reason *not* to inform him. Not only does Miller's reliance not harm anyone nor threaten the scheme's stability, but it is also *not* unfair. His reliance would only become unfair were Kosch to inform him of the scheme—and so cause him to accept the water voluntarily by causing him to have the right beliefs and preferences—and were he still not to do what then counts as his fair share.[69] As his friend, Kosch would have good reason to avoid causing Miller to come to have this

[67] Assume that Miller's use of his water tap doesn't affect anyone else's access to water and that his potential contribution to maintenance is not missed. Assume further that Miller has no reason to inquire about where the water comes from (e.g., he reasonably thinks that his pipes are fed by a backyard well).
[68] His neighbors, then, would be wrong to hold him responsible for his failure. And so, they would be wrong, say, to claim that he owes them back-payments.
[69] And so, if Simmons' account were right, Kosch would, I think, be violating the duties of friendship in forcing this sort of choice on Miller by informing him of the source of the water.

new duty and so good reason not to inform him. This result seems to me implausible. Surely Kosch, as his friend, does have good reason to tell Miller that he is taking advantage of the scheme, and the route taken by *JR* explains why: though unaware of it, Miller is being unfair to his neighbors, and he needs to be made aware of it so he may stop.

Though *JR* does hold that persons such as Miller can unintentionally come to have fairness duties, these duties will not be objectionable impositions, for non-culpable ignorance of the relevant information excuses failure to fulfill them. Granted, informed failure is not excused on this view, but the same holds true of voluntary acceptance, for, on that version, when a person does possess the right beliefs and preferences, her failure is not only no longer justified but also not excused.[70] And so, unknowing reliers do not have reason, based on a worry about the imposition of duties, to reject *JR* in favor of voluntary acceptance.

2.7 Why the Justified Reliance version?

But we still have an important imposition worry: Won't those reliers who do not want to rely on the good provided by a scheme—unwilling reliers—have a strong complaint against *JR* and so good reason to reject it?

Not when their reliance is up to them, for if they do not want the good for the price of a fair share of the burdens, they should not rely on it.[71] Reliance does not count as 'up to them' only when they have chosen in some clear choice-situation to rely. It also counts as such when their reliance results from other informed choices they make, choices, say, to pursue various

[70] The same holds for failure as a result of culpable ignorance: *JR* and the voluntary acceptance version agree that such failure is neither excused nor justified.
[71] Of course, when it is a public good, the person cannot avoid benefiting from it. However, even though he cannot avoid receiving the good, he can often avoid relying on it.

projects: when the pursuit of some project requires reliance on some good, a choice to pursue the project also counts as a choice to rely on that good. One cannot plausibly claim that such reliance is unwilling, for taking responsibility for one's choices requires, in part, taking responsibility for the reliance that enables their pursuit and taking such responsibility requires, in part, regarding the reliance as voluntary. And, when their reliance is up to them, they cannot complain that *JR* objectionably limits their freedom of choice by tying this reliance to a duty to share in the scheme's burdens.

But, what about when their reliance is *forced*? It seems objectionable, on grounds of individual freedom, to find duties of fairness in such cases. And, since *JR* does find them there, it seems it ought to be rejected. Simmons' discussion of the following example, which we'll call *Water Trench*, suggests this sort of argument:[72]

> Each house in Muller's neighborhood depends on its own well for water. Unfortunately, a drought has dried up each house's well. She wants to solve her problem by digging a deeper well; her neighbors unite to dig a water trench from the nearest river. Their trench travels over the only place on Muller's property where she can dig a sufficiently deep well, and her neighbors forcibly keep her from diverting the trench in order to dig her well. She has no option, then, but to use the trench. Does she have a fairness duty to help maintain it?

Simmons argues that Muller does not, for she must rely on the trench only because "collective action has *precluded* the possibility of private provision… of the public good in question."[73] Muller, he thinks, would be justified in free-riding.[74] Water Trench is inadequately described, for it matters what reasons

[72] Simmons (2001), 34. The character's name is my own addition.
[73] Simmons (2001), 36. Of course, Simmons' discussion does not concern the specific question of forced reliance but rather forced benefit via the preclusion of private provision of a good. His discussion, though, applies to the specific case of forced reliance.
[74] The claim that Muller cannot owe her neighbors on account of what they've forced on her seems, for Simmons, to be the expression of a basic moral truth.

the neighbors had to dig the trench where they did. Indeed, if private provision is already morally precluded—if Muller lacks a right to private provision—being deprived of such provision as an option does not injure Muller's freedom.

Now, chance or circumstances can force a person to rely on some scheme without thereby rendering considerations of fairness inapplicable. Suppose, for instance, that the trench travels along the edge of Muller's property and that there is only one suitable spot for a deep well. As Muller digs there, the drill bit breaks and lodges in the hole, rendering the half-finished well utterly unsalvageable. Although she has no other choice but to use the trench, she still incurs a duty of fairness to help maintain it once she uses it. Or, imagine instead that Muller discovers while trying to drill her deeper well that under the whole of her property is an unusually hard layer of bedrock between her and the water through which she cannot drill. Again, she has no choice but to use the trench, but, once she does, she has a duty of fairness to help maintain it.

Other moral duties may similarly force reliance without rendering considerations of fairness inapplicable. Suppose that, if Muller drills the deeper well, she will take water that a nearby nursing home counts on as its only water source. In this case, it would be wrong for Muller to dig that well: the nursing home counts on that water and she has convenient access to a trench of water. Although she is (morally) forced to use the trench, when she does, she still incurs a fairness duty to help maintain it. Suppose similarly that, in Water Trench, digging the trench where the neighbors do is the only feasible way for them to restore their water supply. In this case, Muller is (morally) forced to use the trench, and, once she does, she has a duty to help

maintain it. It is not always the case that a person has a right to private provision and, when she does not, she has no complaint if collective action precludes such private provision.[75]

In this way, a person forced to rely on the goods provided by a scheme will not always have a complaint of imposition. But she certainly will, it seems, when the other participants force her reliance without sufficient justification.[76] In such cases, *JR* mistakenly holds that she is required to share in the burdens. Since this imposition objection goes to the heart of the justification of any version of the principle of fairness, I suggest the following revision to the principle, *JR**:

> Absent special justification, it is impermissible to rely on the receipt of benefits from some scheme for the pursuit of one's own good, benefits that are the same as the benefits others receive from that same scheme, without also sharing proportionally in the burdens those others bear (or the sacrifices those others make) by their participation in the scheme in order to provide those benefits, *so long as that reliance is not unjustifiably forced by those others.*

If *JR** is ultimately a defensible version of the principle, people in most political communities will have some duties of fairness, ones that they owe to

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[75] I do not mean to beg the question here against Simmons. The claim is that our take on *JR*'s judgments about these sorts of cases where private provision is precluded and so reliance forced depends on whether we think the person already has a right or moral claim to private provision. I am willing to admit that there are cases where she does have such a right; but it also seems to me that there are cases where, simply because of the situation of others, she lacks such a right.

[76] I have restricted this question of forcing to forcing done by other participants because I am inclined to agree with Kent Greenawalt's judgments about certain examples in which participants have a duty of fairness even though they are unjustifiably forced by non-participants to adopt the scheme. Consider: Each member of a village is required to transport a certain amount of water each day to the village from a nearby stream as a way to deal with the village's water shortage. Each benefits from the water supply, and the distribution of transport burdens is in fact fair. However, this scheme is demanded of the villagers (and their obedience coercively enforced) by the army that has recently and unjustly conquered the area. It is plausible to say, as Greenawalt does, that the villagers do have a duty of fairness to each other to do their part in the scheme, even though the army's coercive implementation of the scheme on the village was unjust. See Greenawalt (1987), 130.

their fellow citizens *qua* fellow reliers. The specific duties they have will depend on the cooperative schemes in place. Citizens of many contemporary states will have fairness duties to support, say, the municipal fire service, the maintenance of the road network, the scheme of traffic regulation, the municipal water and sewer systems, among other cooperative schemes. And they will have these duties even if they lack a duty to uphold the law, for the fact of their reliance on these schemes remains.[77]

3. Duties of Fairness and Enforceability

As we have seen, Nozick argues that the fact that someone has a duty of fairness does not by itself imply that any others may permissibly enforce that duty. There is reason to think that this is true about many duties: perhaps no one possesses the moral standing to force you to do what you have some duty to do (e.g., one's spousal duty not to commit adultery); or, perhaps what this duty requires of you is not the kind of thing that can be forced (e.g., one's duty of gratitude towards a benefactor). The question here is whether reliance-based duties of fairness are generally duties that may be enforced. Recall that one of Nozick's reasons for rejecting a fairness account of political obligation was that, even if a person were to have such a duty of fairness to uphold the law, it would not be morally permissible (because of the consent proviso) for anyone else to force her to abide by that duty.

My argument that *JR** is the correct account of the principle of fairness makes no claims about whether such fairness duties are normally

[77] The conclusion of this section is compatible, then, with philosophical anarchism (i.e., the denial that citizens of even a reasonably just state have political obligation). It is not compatible, though, with Simmons' influential version of anarchism, for Simmons' version denies not only that such citizens have political obligation but also that they have any political duties.

enforceable.[78] *JR** purports to capture what you, as someone relying on the benefits of some scheme, normally have conclusive reason to do. What others may or may not have reason to do—either to ensure that you do what you have conclusive reason to do or to cause you to do so when you fail to on your own—is a separate question.[79] But it is nevertheless a relevant question, for, on the normal understanding of political duties, an individual's co-citizens—or her state, as her co-citizens' representative—have the right to force her to fulfill her political duties. And so, it seems an important question whether Nozick's consent proviso—which holds that, unless a person has consented to have the fairness duty, others cannot force her to abide by it—is correct.[80]

Granted, considerations governing the permissibility of coercion in particular cases are quite complex. The question here about whether a duty is normally enforceable concerns only a subset of these considerations. To say that a duty is enforceable is not to say that every instance of that duty's enforcement is legitimate; rather, it is simply to say that this duty is normally a legitimate *candidate* for enforcement. Justifying a particular instance of enforcement requires addressing additional concerns, for instance, about who enforced it, how they did so, why they did so, or concerning the larger context surrounding the enforcement. The question here, then, is whether a person

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[78] Neither Rawls nor Simmons addresses this question of enforceability as a question separate from that of the existence of the duty. Klosko's account of the duty seems to include, as part of the account, questions of enforceability.

[79] I mention both strategies here in order to leave open the route towards justified coercion that Warren Quinn outlines: on Quinn's view, we can justify the exercise of coercion by justifying the issuing of genuine threats of coercion, for, once it is permissible to issue genuine threats, it is only a short jump to permissible coercion should the individual fail to heed that threat. See Quinn (1993), 52-100.

[80] For Nozick's claim, see Nozick (1974), 95. Nozick's consent proviso is important, then, because of its implications for the possibility of legitimate (i.e., morally permissible or justified) exercises of coercively enforcement of law even when those laws are not legitimate (i.e., authoritative).

can reasonably reject a principle holding that, absent special justification, duties of fairness are not enforceable.[81]

My position here is twofold: (1) When the cooperatively-provided goods in question are confined to a subset of public goods corresponding roughly to what Klosko calls presumptive goods, a person can reasonably reject a principle holding that, absent special justification, it is impermissible to enforce those duties of fairness generated by reliance on those goods. For these goods, duties of fairness are enforceable. And (2), for all other cooperatively provided public goods, a person cannot reasonably reject a principle holding that, absent special justification, it is impermissible to enforce those duties of fairness generated by reliance on these goods. For these other goods, duties of fairness are not enforceable.

3.1 Fairness and enforceability: the argument

Except for the duties of fairness generated by reliance on presumptive goods, duties of fairness generated by cooperatively-provided public goods, I claim, are normally not enforceable. This claim that, absent special justification, enforcement is impermissible is based on a claim about what is required to respect as free choosers those who are bystanders to a cooperative scheme: without the moral presumption that one is a bystander expressed in this prohition on enforcement, actual bystanders to schemes would be vulnerable in ways that objectionably constrain their exercise of choice. Consider Quiet Neighborhood. The claim here is that Baltazar's neighbors

[81] This question is equivalent to the question of whether a person can reasonably reject all principles holding that duties of fairness are enforceable in this limited, candidate-for-enforcement sense. This formulation makes the perspective of the bystander particularly salient, while the first formulation makes the perspective of the relier particularly salient. They are, however, the same basic question.

cannot reasonably reject the following: Since the neighborhood quite is a non-presumptive public good, it is normally impermissible for them (or anyone else so inclined) to enforce Baltazar's duty of fairness to be especially quiet. They cannot reject this principle because of how a general permission to enforce such fairness duties would objectionably constrain the free choice of bystanders.[82] The benefits to bystanders of the general assurance that they are not vulnerable to (mistaken) efforts at enforcing compliance requires this general prohibition on enforcement of such fairness duties.[83]

In Quiet Neighborhood, the cooperative scheme is the result of the cooperators' coordinated and permissible exercise of choice, and so it ought to be respected: bystanders ought not interfere with the workings of the scheme or otherwise threaten its success, and those who rely on its benefits have a duty to share in the burdens. *JR**'s claim that others *qua* reliers have a duty of fairness to support the scheme is a claim about what is required to express respect for the cooperators as free choosers. But, its insistence that it is *reliance* that ties a person to a scheme (rather than mere receipt, consent or voluntary acceptance) is a claim about what is required also to respect that person as a free chooser: the duty affects the permissible options available to her but only by attaching to some available good—one that would not have been available to her as a prospective relier without those cooperators anyway—a fair share of the same burdens that the cooperators bear. The underlying value of the

[82] As Scanlon notes, "general prohibitions and permissions have effects on the liberty, broadly construed, of both agents and those affected by their actions" (Scanlon (1998), 203). The idea here is that a permission to enforce these fairness duties would affect the freedom of bystanders in an important and objectionable way.

[83] This sort of assurance, then, is important component of bystanders' freedom. Compare with Scanlon's explanation of the right to privacy: "Our need for privacy, for example, is not met simply because, as a matter of fact, other people do not listen in on our phone calls and go through our personal files. In order to have the benefits of privacy we need to have assurance that this will not happen, and this is something that general acceptance of a principle can provide" (Scanlon (1998), 203).

*JR** account, then, is the value of choice.

The same value, I think, should guide our thoughts about the enforceability of fairness duties, for choice is often valuable only insofar as it is effective—that is, insofar as what you have chosen comes to pass—and others' failure to fulfill their duties can threaten the effectiveness (and so the value) of one's own choices. In this way, considering the standpoint of the cooperator reveals some reasons favoring a general permission to enforce fairness duties. The cooperator has an interest in the success of the scheme, not only because the scheme will provide her with some good she values—though this is an important basis—but also because she rightly values the sort of moral accomplishment that is the cooperators' coordinated exercise of choice. When cooperative schemes are successful, it is often because the cooperators have developed relations of trust and common purpose that sustain the scheme. This interest in success, then, seems to speak not only in favor of holding all reliers to a duty of fairness but also in favor of allowing cooperators (or anyone so inclined) to enforce this duty against those who are free riding on the scheme.[84]

This interest, however, seem to be countered by the interests of bystanders to the cooperative scheme, that is, by the interests of those who are not relying on the good and so do not in fact have a duty of fairness to support the scheme. From this standpoint, there is good reason to reject principles making fairness duties legitimate candidates for enforcemnet. In order for a cooperator permissibly to enforce a duty of fairness to share in the burdens of some scheme, she would need to determine who is actually relying on the

[84] Particularly if it is an ongoing scheme, since public or well-known free-riding in such a scheme risks a corrosive effect on continued successful cooperation.

good provided and who is instead simply a bystander. Determining a person's reliance-status, however, is normally not simply a matter of seeing that he is or is not performing some particular external action (e.g., building models outside, playing Wagner), for a person's acting in some particular way will often be compatible both with his relying and his not relying on the good. One cannot determine whether he is relying simply by looking at what he is doing: that Baltazar is building his models outside is not enough to show that he is relying on the extra quiet. Determining his reliance status requires making judgments about the reasons for his actions, for it is on the basis of these reasons that he counts as either a relier or a bystander.

Suppose the cooperators (or anyone inclined to enforce the duty) were to have the standing to make these judgments about whether a person is relying on a cooperatively-provided public good. The burden of avoiding being forcibly made to bear some of the burdens of supporting the scheme, then, would lie with the bystander. He would have reason to avoid doing whatever might seem to be evidence of reliance—building his models outside—or as evidence of unfair reliance—playing Wagner outside—even though both are actually permissible, or he would at least have reason to take affirmative steps showing the cooperators that he is a bystander and not a free-rider. The bystander, as a bystander, is simply pursuing his own projects, plans and relationships—simply exercising his own freedom—alongside the cooperators, minding his own business while they set up and maintained their scheme. His vulnerability to this sort of coercion, then, would derive not from anything he has done, for he has simply gone about his life, making various choices and relying on other goods, but rather from the choices others have made to provide themselves with benefits for the pursuit of their own

good.

And so, if it were not impermissible, absent special justification, to enforce fairness duties, a bystander to some scheme would be vulnerable to coercion in ways that objectionably constrain his exercise of choice, for he would need to take action to show that he is, in fact, a bystander. It seems, then, that a bystander would have good reason to object to this burden and so to insist that it not be up to him, once the others' scheme is up and running, to show that he remains a bystander. He can, then, reasonably reject principles that make reliance-based duties of fairness legitimate candidates for enforcement. The moral presumption must be that a person is a bystander, and this presumption is expressed in this general prohibition against enforcement.[85]

But what about the cooperators' admitted interest in the success of their cooperative scheme? Their scheme is liable to be less stable than it would be were persons to have the standing to enforce free riders' fairness duties to support the scheme. This is a legitimate concern. And cooperators do have available ways of mitigating this danger to scheme-stability that do not threaten the interests of bystanders. Here are two general ways: (1) When possible they should set their scheme up as an excludable scheme so that no one can rely on the benefits unless they consent to the scheme.[86] Or (2) they

[85] It might seem that this argument against enforcement cannot work because it is based on epistemic worries: so long as the duties are enforced as they should be only against those who actually have the duties, there is no worry about freedom, for those with the duty are do not have a right to refuse to fulfill it and bystanders have no duty in the first place. The problem, though, is that these epistemic worries about distinguishing successfully between reliers and bystanders are normally present, and, as such, they raise worries about the effects of a general permission allowing enforcement on the freedom of bystanders (worries they themselves are likely to appreciate).

[86] Or, alternatively, unless they perform some action that counts as voluntary acceptance of the benefit and so clearly makes them a participant. Krishnamurthy in Public Well clearly voluntarily accepts the benefits of the well by taking water from it.

should, even for a public-good scheme, give potential reliers the chance to consent to being participants and so to being treated as reliers. Both strategies make use of the mechanism of individual consent: by consenting, the person voluntarily makes it known that she is a participant in the scheme, not a bystander, and so the consent-reinforced duty of fairness is enforceable against her for reasons that do not threaten genuine bystanders with enforcement. This suggests that consent will do some work in a satisfactory account of duties of fairness along the lines of the work that Nozick has it do with his consent proviso.

3.2 Consent, fairness and enforceability

As I mentioned earlier, there is something compelling about the claim that Baltazar's neighbors are required to give Baltazar the chance to give or to refuse his consent to their scheme before they implement it in the neighborhood. But, as the *JR** account shows, Baltazar's consent, whatever other work it may do, is not required to generate his fairness duty to support the scheme; his reliance on the neighbor's cooperative scheme generates the duty. We need, then, some other explanation for why the neighbors are required to give Baltazar the chance to consent.[87] What would his consent make possible that otherwise would not be?[88] Baltazar's consent to the scheme, it seems to me, would make his fairness duty to share in the burdens of the scheme enforceable: assuming that the other conditions for permissible enforcement are satisfied, a neighbor would be justified in going over to

[87] I am assuming here that this consent requirement is a real consent requirement and so that it is not actually a requirement that the neighbors merely inform him of their scheme. There is some sort of permission that Baltazar is able to give or to withhold that his neighbors seem required to try to get.

[88] I am also including here with consent the sort of voluntary acceptance that is possible with an excludable good. Krishnamurthy in Public Well is a good example.

Baltazar's house and turning off his music.[89] Consent, then, is connected, not to the existence of the duty, but to its permissible enforcement.

Let us consider, then, a version Quiet Neighborhood in which Baltazar's neighbors do give him the chance to give or to refuse his consent to their proposed scheme. Before setting up the scheme, then, they ask him whether he would like to participate in their scheme and so whether he agrees to be particularly quiet in his backyard. Baltazar, of course, has two options: he can answer (1) no or (2) yes.

Consider (1): Baltazar refuses his consent to the scheme. Now, it need not be that he refuses in order to free ride. Suppose that Baltazar has the following quite plausible preferences: (i) he prefers to build his models; (ii) he prefers playing Wagner outside; and (iii) he prefers playing Wagner to building his models. With these preferences, then, Baltazar does not refuse his consent because he wants to take advantage of his neighbors and their scheme but rather because, if he agreed to the scheme and so agreed not to play Wagner outside, he would bar himself from doing what he actually prefers more to do.

According to *JR**, despite this refusal to consent, it will still be wrong of Baltazar to play Wagner after his model-building *if* he relies on the added quiet the neighbors' scheme provides, say, when building his models. It is the source of the extra quiet that makes it wrong of Baltazar to do both things—to rely on the quiet and to play Wagner outside—because doing both amounts to taking unfair advantage of his neighbors and their scheme. On grounds of fairness, Baltazar may only choose one or the other, not both, even though he

[89] I am here taking Arthur Ripstein's claim that what consent does, in standard cases, is to make morally permissible what would otherwise be impermissible to be generally correct. For his claim, see Ripstein (2004).

refused his consent to participate in the scheme. However, the partisan of Nozick's consent version of the principle might object in the following way:

> Here, Baltazar's neighbors knew exactly where he stood—he did not want to be a participant—and yet they went ahead with their scheme anyway. So, they cannot then complain when Baltazar plays Wagner in his backyard. And, since his reliance on the quiet they provide does not harm them in any way, they cannot complain should he do that too by building his models outside. Baltazar's doing both (after refusing to consent), then, cannot be wrong, and so *JR** must be mistaken.

This is an important objection, but I do not think it succeeds. It does, however, point to the role that consent does play.

To see why it fails, suppose that Baltazar has an additional (and quite plausible) preference: (iv) he prefers doing both—building his models and playing Wagner outside—to doing only one or the other. Now, if this consent objection were correct, and Baltazar has no reliance-based duty not to both rely on the quiet and play Wagner outside, then it would be quite hard to explain why Baltazar would have reason to consent to the scheme in the first place when given the chance. If his consenting to the scheme were the only way for his playing Wagner after model-building to be wrong of him, then it seems he would rarely have reason to consent in the first place, for, unless his participation is necessary for the scheme's stable success, all that his consenting would accomplish would be to bar him from doing something he prefers to do but not so as to enable him to do something he prefers more. In this way, we come back to the same considerations as before: consent cannot be necessary for the duty, for then cooperative schemes would be very unstable and would-be cooperators deprived of important avenues for the exercise of choice.

Consider (2): Baltazar gives his consent. In this case, Baltazar agrees to be a participant and so to being treated as a relier; it would certainly be wrong, then, for Baltazar to play Wagner in his backyard. And, importantly, his playing Wagner would be wrong whether or not he ever actually does rely on the quiet provided by the scheme. In this way, while the consenting reliers' duties to bear some of the scheme's burdens are thereby overdetermined, those of consenting non-reliers are not. Getting someone's consent, then, can do some work: when an individual consents, her status as a participant with the relevant duties of fairness no longer depends on the fact of her actual reliance on the scheme.

And, by doing this work, a person's consent mitigates the concerns about ensnaring bystanders that justified the general prohibition against enforcing fairness duties to support cooperative schemes providing public goods. The consenters have taken the affirmative step of consenting to participate and, by doing so, have made their actual reliance irrelevant. For those who have consented, then, one need not make judgments about whether they are actually relying on the goods that scheme provides; instead, one only need to make judgments about whether they are actually acting in those ways that reliers have a duty to act. Allowing for enforcement of duty of fairness against consenters who are impermissibly free riding does not, then, threaten to constrain the choice of genuine bystanders who are simply going about their business. In this way, enforceability does seem to require consent.

In Quiet Neighborhood, then, Baltazar's neighbors cannot simply demand that he refrain from either working on his models or playing Wagner, for he may be able to do both permissibly; they may only demand that, if he does both, he not rely on the quiet they provide. And, for reasons we've seen,

this demand, unlike the simple demand that he not play his music, is not normally enforceable. If Baltazar consents to participate, however, he agrees to refrain from doing certain things, say, playing Wagner outside, and this sort of thing is enforceable, since it no longer matters whether he in fact relies on the quiet provided.

And this difference in enforceability between a consent-reinforced fairness duty and a purely reliance-based one explains both why those setting up a scheme have reason to get the consent of those others who will rely on the scheme and why those who will rely often have reason to give it.[90] Those setting it up have reason to get others' consent because those others, by agreeing to be a part, tie themselves to the scheme in a stronger way: the cooperators can legitimately expect them to act in certain defined ways, and they may legitimately hold them to those expectations, perhaps even forcibly.[91] Cooperators have good reason, then, to create opportunities for reliers to give this consent.

And those who will rely have reason to give their consent when asked because consenting allows them to tie themselves more firmly to the scheme, thereby making free-riding less tempting for themselves later, as well as expressing to others their commitment to the scheme.[92] By consenting, they are able to contribute some small part towards that scheme's stability, an

[90] But what explains our general sense that cooperators are *required*, if they can, to get a potential cooperator's consent? I think this sense that it is required comes from our assumption that the cooperators, especially when the schemes provide important goods, will want to be able to coerce those who are free riding.
[91] Provided, of course, that the other criteria for permissible coercion are also met.
[92] That they would give their consent might seem implausible; however, the scheme is a scheme they would have a reliance-based duty to support anyway, whether or not they consent. It is not so implausible, then, that they would consent in order to ensure that they fulfill their duty. This sort of consent, then, is a mechanism for precommitment: a person is able to ensure now that he will act in a certain way later. For more on precommitment, see Elster (1984).

ability that they, as reliers, are likely to find important. And, the more important the benefits the person is looking to rely on and/or the greater the burden they would have to bear, the more reason they have to consent to it.[93] In this way, those schemes for which cooperators will most need the consent of fellow reliers will be the schemes to which good-faith prospective reliers will have stronger reasons to consent.

3.3 Freedom-enabling goods and enforceability

However, this argument for a general prohibition on enforcement of reliance-based duties of fairness loses its force for the class of schemes that provide what I'll call basic, freedom-enabling public goods, for there are no bystanders within the scope of the distribution of such goods. Within the distributive scope of these schemes, everyone is either a cooperator or a free rider, and so there are not the worries about bystander freedom that justify the prohibition on enforcement of fairness duties. What are freedom-enabling public goods? Essentially, they are the same public goods that Klosko's account of presumptive goods captures: e.g., the security and predictability provided by a functioning legal system, national defense, fire and other disaster protection, and possibly transportation networks and public education.

For Klosko, recall, what generates fairness duties to help provide presumptive goods is the substantial amount of benefit they provide.[94] In his view, the amount of benefit serves an epistemic function: it gives us good reason to hold that anyone receiving presumptive goods would choose to

[93] They still have the right to decide not to consent to it, since it is up to them whether they want this more firm tie to the scheme.
[94] See the discussion in Section 2.

pursue those goods if their pursuit of them were required for their receipt.[95] On my view, the status of some public goods as freedom-enabling serves a similar epistemic function: we can assume that any individual pursuing various projects, plans and relationships that she values—that is, anyone pursuing her own conception of her good—will, by virtue of this pursuit, rely on these public goods provided by her society. Without these goods, she would be unable to pursue her projects as she does, and so her freedom to control by the exercise of choice the course of her own life—her projects, concerns and commitments—depends on the availability of these goods. No person, then, can object on grounds of freedom to being held to a duty of fairness to help provide such freedom-enabling public goods. And so, on my view, what is relevant about these goods is not the amount of benefit they provide but rather the role they play in promoting the individual's freedom and control over her own life.

The main claim here is that, when the cooperatively-provided goods in question are basic, freedom-enabling public ones, a person cannot reasonably reject all principles that make it permissible to enforce duties of fairness generated by her reliance on these goods. And she cannot reasonably reject all such principles because, with regard to such goods, she cannot be a bystander: these goods are ones that anyone as a free individual pursuing her conception of her good will rely upon in formulating and pursuing that conception. These goods are required for her choices, and so her pursuit of her own good, to be meaningful and effective in the first place. No one, then, can legitimately claim, as a bystander could, that being forced to support the relevant schemes is an objectionable curtailment of her freedom and control over her own life.

[95] Klosko (1992), 43.

In this way, the cooperators (or some other enforcer) need not ask whether she is actually relying on the scheme, and so they need not make determinations about her reasons for acting in certain ways. They may legitimately assume that she is actually relying on the scheme and so that she has fairness duties to do certain things to support the scheme. And so, there are not the questions about the cooperators' moral standing to enforce these duties that there were about fairness duties to support other cooperative schemes.

3.4 Political duties of fairness without legitimate law

Thus, even if citizens are, as Simmons would have it, in a "highly socialized" state of nature with each other, they may nevertheless have political duties of fairness towards each other that may legitimately be enforced. Even if the laws of a state are not legitimate—even if they are not authoritative—it may still be the case that, under these circumstances, it is permissible for the state to enforce their citizens' political duties of fairness, which they owe to each other, to support the public provision of freedom-enabling public goods. Of course, to say this is not yet to establish that is permissible for such a state to enforce them, for there are many other criteria to be met before enforcement is permissible.[96] But the question of justified state coercion is separate from the question of legitimate law: it may be the case that, even though the law lacks authority, the state may permissibly enforce at least those laws that formalize citizens' duties to support schemes providing freedom-enabling public goods. My *JR** account of the duty of

[96] These criteria may require that the agent of enforcement also be (or be connected in the right way to) either to a legitimate political authority or at least to a political authority that aspires to legitimacy.

fairness, then, leaves open the question of legitimate political coercion without legitimate political authority.

4. Fairness and Political Obligation

Citizens of reasonably just states, then, will have political duties of fairness towards their fellow citizens, even if they lack a duty to uphold the law. But what about the problem of political obligation? I argue that the principle of fairness—the *JR** version or any other—cannot form the basis of a satisfactory account of citizens' duty to uphold the law *qua* law. And so, even though they are mistaken about the principle of fairness itself, Nozick, the Rawls of *Theory* and Simmons are rightly skeptical of attempts at a fairness account of political obligation. Because I have defended a fairly productive version of the principle of fairness, however, my rejection of such fairness accounts must be different than theirs.

Political obligation is importantly different from other duties, for to have it is to stand in a relation of subjection to another's legitimate practical authority (or 'authority,' for short), a relation that one does not stand in when one has other duties, including political duties of fairness. The duty to uphold the law is a requirement to treat the law as authoritative, which amounts to treating the institutions and procedures that create the law as practical authorities whose directives thereby merit obedience.[97] This connection to authority makes this duty different in kind from other political

[97] Roughly put, to obey an authority is to do something not because you judge it to be the appropriate, right or good thing to do, but because the authority judges it to be so. More precisely, to obey an authority is to treat that person's judgment that you should do *x* in some situation as by itself a conclusive reason for you to do *x*, or, in other words, as a strong reason to do *x* that also disallows acting on your own judgment of what to do in the situation (where 'the situation' here excludes the fact of the other's judgment). For Joseph Raz's account of authority and obedience, see Chs. 2-4 of his *The Morality of Freedom* (1986) and his *Practical Reasons and Norms* (1999). For a similar (and shorter) account, see John Gardner and Timothy Macklem's "Reasons" (2002), especially Section 6.

duties of fairness.

4.1 Practical authorities and practical reasons

Consider the duty to pay your fair share of taxes to support municipal fire protection, a duty you have because of your reliance on this cooperatively-provided public good. Suppose the state, acting in accordance with the law, exacts this fair share from you. In this case, you ought to pay the taxes the state says you owe. But you should pay them, not because the state says you should, but because fairness requires it. Your fairness duty here is only contingently connected to the law: you should do what the law says because you already have a duty pay your share. This is not a duty to uphold the law *qua* law, since there is nothing so far about a law's status as law to give you reason to do as it directs.[98]

When you possess political obligation, you should pay your taxes for fire protection not simply because you have a fairness duty to do so but because the law directs you to do so. Furthermore (and here is where authority makes a difference), should you judge that what the law demands you pay is not what fairness requires of you, you may still have a duty to pay the amount the law demands, for it is the law's determination of your fair share, not your own, that counts here.[99] The question of political obligation, then, is not concerned with what political duties you have, whether fairness ones or some other kind. Rather, it is concerned with whether you should abide by your own or the law's judgments about what duties you have and

[98] This difference between a duty to something because the law commands it and a duty to do something that that the law also happens to command has been noted by many, including Robert Paul Wolff (1998) and A. John Simmons (1979).
[99] For more on practical authorities and their effect on their subjects' deliberations, as well as on the law's claims of authority, see Scott Shapiro's excellent discussion in his "Authority" (2002).

about what they require in specific circumstances.

My argument for *JR** has defended the claim that reliance on certain cooperatively-provided goods can give you duties of fairness. But the generation of these duties by your reliance does not by itself deprive you of the right to act according to your own best judgment: the content of these duties is not determined by anyone's particular judgment of the situation but rather by the situation itself. A separate argument is needed for the claim that the cooperators together—or an institution representing them—gain the right to replace your judgment of what fairness requires of you with their judgment, which is the distinctive right of a practical authority, simply by creating a cooperative scheme that you come to rely on.

This sort of authority raises new questions about freedom and the exercise of choice. Authoritative directives, particularly those with which you disagree, can reasonably feel like impositions or unwelcome or like unjustified constraints on your own choices. And this authority is a kind of power of one person or group over another, power that, in addition to raising worries about its abuse, may simply be incompatible with the other's freedom. Authority requires special justification, justification the principle of fairness by itself cannot provide.

4.2 Justified Reliance*, stability, and the duty to uphold the law

Consider the fairness account that Rawls offers in his "Legal Obligation and the Duty of Fair Play":

> [T]he obligation to obey [or, uphold] the law, as enacted by a constitutional procedure, even when the law seems unjust to us, is a case of the duty of fair play as defined. It is, moreover, an obligation in the more limited sense in that it depends upon our having accepted and our intention to continue accepting the

> benefits of a just scheme of cooperation that the constitution defines.[100]

Here, Rawls uses the voluntary acceptance version of the principle, a version that I have argued is unsatisfactory. For this reason, Rawls' early fairness account of political obligation fails.

It might seem, however, that we can repair Rawls' argument fairly easily, for we now have a successful version of the principle of fairness in *JR**. All we need to do, then, is to plug *JR** into Rawls' argument for political obligation:

1. Having one set of reasonably just laws governing the interactions among citizens provides for them the great good of a rule-governed and reasonably just social stability.
2. Such stability is a great good: it provides the predictability that persons need if their lives are to reflect their choices in ways they rightly care about.
3. In order to have this one set of laws—and so in order to provide this stability—one individual (person, institution or set of institutions) must have the authority to set down the content of these laws.
4. The majority of citizens uphold the laws as set out by the institutions claiming authority.
5. Their obedience, taken together, provides all citizens with the stability upon which they all rely.
6. Therefore, according to *JR**, all citizens have a duty of fairness, owed to these fellow citizens, to uphold the laws.

Here we have an argument that, if your fellow citizens uphold the laws issued by the institutions claiming authority and if you rely on the goods that obedience realizes, you have a duty of fairness to uphold those laws as well. On this account, considerations of fairness can generate political obligation.

Now, a free rider certainly has a duty to do her share of providing

[100] Rawls (1999c), 122-3.

social stability, for this stability is certainly a benefit she relies on. However, the argument does not succeed at showing that this duty is a duty to uphold the law, for it cannot justify the claim that the cooperators themselves are correct to regard the laws as authoritative and so requiring obedience. Consider what the cooperators would say to a free-rider:

> We provide this beneficial social stability by treating the law as having the reason-giving force of a directive we have a duty to abide by. Because you rely on this social stability, you have a duty to treat the law as having this reason-giving force.

An argument for political obligation must show that the cooperators are themselves right to treat the law as authoritative. This fairness argument does not show this, but instead assumes that the cooperators are already right to treat the law as authoritative and argues that, because the cooperators do so, would-be free riders must as well.

Because this fairness argument assumes that some already have political obligation, it cannot be that the only reason any citizen has to recognize a duty to uphold the law is that the majority of others does so, for each of those in that majority would only have reason to recognize it because some majority does so. If everyone had reason to recognize the duty only because most others do so, we would have a case of collective self-deception forming the basis of this duty: we all have this duty only on account of us all believing that we do, and this belief itself has no basis. Such self-deception would be problematic because of the power the law purports to have: the power, simply by issuing a law, to replace in citizens' deliberations certain of their judgments with its own, even when citizens believe in good-faith that its

judgments are unwise or unjust.[101] There must be an argument that some majority is right to recognize this duty to uphold the law, an argument that uses some basis other than the principle of fairness. If we can offer this argument and so vindicate the claim that a majority is right to recognize the duty, this argument will likely work just as well for the free rider, for it will likely rely not on their status as cooperators but on some other status, one that the would-be free rider will possess as well.

4.3 Justified Reliance* and the duty to uphold particular laws

In his *Political Obligations*, Klosko argues that, even if the principle of fairness cannot ground a general duty to uphold the law, it may still ground duties to uphold certain rather important laws. The provision of important public goods such as law and order and national defense require complex institutional arrangements that coordinate large numbers of people (what Klosko calls "regulated coordination).[102] In a diverse society, however, people are liable to have different and conflicting views about how to provide these public goods. Were persons to contribute to these schemes based on their own judgments of what fairness requires of them—even if they are conscientious and good-faith judgments—the scheme is liable to fall apart. Since the provision of these goods requires that most citizens do their assigned parts in highly coordinated schemes, fairness requires that all citizens abide by the scheme's determinations of what their duties are rather than their own.[103]

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[101] In other words, the law claims the power sometimes to require people to go against what they take to be their better judgment. For an account of the claims of the law, see Raz's "The Claims of Law" in Raz (1979). In *The Authority of the State*, Leslie Green argues that the law's claim of authority is part of "the self image of the state." See Green (1988), 1-8, 21-62. For a dissenting view, see Philip Soper's *The Ethics of Deference* (2002), 51-88.
[102] Klosko (2005), 24.
[103] For Klosko's extended argument, see Klosko (2005), 17-59, especially 51-57.

Consider national defense.[104] Many of the important disagreements about national defense are, at least in part, disagreements about morality and justice: What constitutes an effective national defense? What are the moral limits on the means of national defense? How are we to weigh the need for this presumptive good against the needs for other presumptive goods? Achieving a stable scheme of regulated coordination that successfully provides this public good of national security for all requires not just that the law solve simple problems of coordination—problems akin to deciding the side of the road we are to drive on—but that it also make judgments about these controversial moral matters.

It is not so clear, however, that individual judgment—or, the lack of authority—poses such a large threat to the stability of such a cooperative scheme. For certain simple problems of coordination in providing national defense, the law's selection of one defense scheme over other possible ones will make that one scheme salient, and this salience will give citizen-cooperators strong reasons to fulfill their duty of fairness by conforming to that scheme.[105] But, even for controversial moral matters, authority does not seem required to provide the stability and regulated coordination the scheme requires. Because a national-defense scheme provides a presumptive good to others—one that is necessary for them to live acceptable lives—it will normally be impermissible for a person to interfere with the scheme actually providing that good and so with the good faith efforts of those charged with administering the scheme, even if she reasonably disagrees with important

[104] Klosko claims that national defense is one of the presumptive public good that most clearly requires state authority for its provision. See Klosko (2005), 29-30, 41.
[105] For an argument that solutions to coordination problems do not require authority, see Green (1988), 111-5.

parts of it.[106] This duty not to interfere with the scheme is grounded in the importance of this good to the others. And so, even if your duty of fairness to do your part to support a scheme of national defense does not give you a duty to support the particular scheme in place in the way demanded, that the good is necessary if others' lives are to be acceptable gives you a strong duty not to interfere with that scheme.

Furthermore, if the provision of a presumptive good—provision that requires regulated coordination—were sufficient to establish an obligation to uphold the laws governing that provision, there would be no work for a requirement of democratic decision-making to do in an account of the laws' authority. So long as the scheme that is implemented is a reasonably fair one, the duty to uphold the law seems to follow regardless of how that reasonably fair scheme was chosen, whether by a democratic assembly, by a counsel of wise elders, or by a benevolent despot. In this way, the argument from the provision of presumptive goods competes with any argument that requires democratic decision-making for a law's authority.

Even though he accepts this argument from the provision of presumptive goods, Klosko also defends the argument from democratic decision-making. When there is disagreement about the workings of the cooperative scheme, he says, "a fair decision procedure should be used to select a principle of fair distribution from the class of defensible principles as

[106] It might be said that, if a person has this sort of duty not to interfere with a scheme, then those charged with administering such a scheme do have a kind of authority over her, what William Edmundson calls "modest authority" (Edmundson (1998), 42, 48). Whether we allow that this is a kind of authority, what is important is that it is not the kind of authority that law claims or that is the traditional understanding of authority in treatments of the problem of political obligation. Note also that this 'modest authority' is stronger than the 'authority' that Robert Ladenson argues for in his "In Defense of a Hobbesian Conception of Law" (1980). The 'authority' Ladenson defends is a "justification-right" or liberty to enforce one's directives that is not paired with a duty of those subject to the authority not to resist. Edmundson's 'modest authority' consists in a right that is paired with such a duty.

well as the means of implementing that principle throughout society."[107] The fair procedure he recommends is a democratic process that grants each person the right to have her view considered. If such a procedure is not used, he argues, citizens will not have a duty of fairness with regard to the scheme in question.[108] It is only when a defensible scheme of national defense is selected by a democratic process, then, that the citizen-cooperator has a duty to abide by what that scheme determines to be her duty of fairness, even if she disagrees with it. It seems to me that a version of this argument from democratic decision-making is the correct justification of political obligation but, if it is, the argument from the provision of presumptive goods must fail.

Once we move to this argument from democratic decision-making, we no longer have a fairness account of political obligation. On this argument, what gives the selected scheme rather than the other defensible schemes authority over the citizen is its democratic pedigree and not the fact that the citizen benefits, even presumptively, from the scheme. The principle of fairness is, of course, still relevant for determining what our political duties are—we have certain political duties of fairness—and so for determining what disagreements a democratic process has authority over. And, as Klosko's brief account of democracy has it, fairness as a value may play a role in justifying the authority of democracy: democratic procedures are authoritative because they allow each citizen a reasonably fair amount of influence or opportunity for influence.[109] On this use of fairness, however, the citizen does not have a

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[107] Klosko (1992), 64. Klosko endorses this argument in his *Political Obligations*. See Klosko (2005), 69-70.

[108] Klosko argues that it is only when a democratic procedure is used to pick a defensible principle that one of the three necessary conditions for a duty of fairness is satisfied. See Klosko (1992), 64.

[109] This sort of account of democracy is, of course, only one. Other accounts appeal to values besides fairness. For such accounts, see, for instance, Thomas Christiano's *The Constitution of*

duty to uphold the law because her fellow citizens uphold the law and she benefits from that obedience; she has a duty because the law is the result of a fair democratic procedure. In this way, a democratic account of the law's authority is distinct from a fairness account of it.

5. Conclusion

I have argued here that, even if citizens lack a duty to uphold the law, they will have duties of fairness towards their fellows on account of their reliance on the benefits of mutually beneficial cooperative schemes made possible by the sacrifices of those fellows. I offered a version of the principle of fairness—called Justified Reliance*—and I argued that it is appropriately responsive to the interests of the various representative individuals involved, particularly to their interests in exercising choice and control over their own lives.

And, I rejected the claim that we can use *JR** to fix Rawls' fairness account of political obligation. I argued that, while it may explain why a would-be free rider may have a reliance-based duty to uphold the law *qua* law, such an account falls short of a satisfactory account of political obligation. And so, while citizens' political duties, say, to pay their fair share of taxes to support municipal fire protection can be explained by appeal to *JR**, their political obligation to pay what the law judges to be their fair share, even when they reasonably disagree with that judgment, cannot be explained by appeal to any version of the principle. The duty to uphold the law, I argued, requires some other justification, one that the next chapter will begin to develop.

Equality (2008), David Estlund's *Democratic Authority* (2008), Charles Beitz's *Political Equality* (1989), and Jeremy Waldron's *Law and Disagreement* (1999).

IV. THE NATURAL DUTY OF JUSTICE

The previous chapter argued that, while various political duties can be accounted for by appeal to a satisfactory version of the principle of fairness, narrow political obligation—the duty to obey the law *qua* law—cannot. This chapter examines John Rawls' natural duty of justice account of political obligation in *A Theory of Justice*, and it argues that, while the account can justify certain political duties as duties of justice, it is not successful by itself in explaining why a duty to obey the law is a duty of justice. However, we can look to Kant's argument in *The Metaphysics of Morals* for what we need in order to account for the duty to obey the law, consistent with Rawls' overall duty of justice account. And so, the duty of justice, properly understood, forms the basis for a satisfactory account of narrow political obligation.

In the first section, I examine Rawls' account. There, I argue both that Rawls' critics have misunderstood the natural duty of justice, taking it to be a duty merely to promote the occurrences of justice being done in the world, and that Rawls' account, as it stands, is unsuccessful in accounting for narrow political obligation. In the second section, I argue that Kant's account provides what we need for a successful duty of justice account: authoritative resolution of *reasonable* moral disagreement is necessary for living with others in a way that respects everyone's equal right to freedom. In the third section, I respond on behalf of this duty of justice account to two of Simmons' more important objections. In the fourth section, I examine the role played by the ideal of the rule of law in a duty of justice account, and I argue that the fact that a legal system observes the rule of law is by itself valuable insofar as it creates defined spheres of freedom for citizens. And, in the final section, I acknowledge that resolution of reasonable moral disagreement is, by itself,

insufficient for full relations of right among citizens, for it matters how these disagreements are resolved. And so, I argue that an account of suitably democratic government must be a part of a duty of justice account of political obligation.

1. Rawls' Account

In *A Theory of Justice*, John Rawls rejects fairness accounts of narrow political obligation, and he rejects them on the grounds that, to have a duty of fairness, one must voluntarily accept benefits, and citizens merely receive the benefits that the state provides.[1] Rawls does not, however, deny that citizens of nearly just states will have a duty to obey the law. He argues, instead, that, for citizens of nearly just states, the natural duty of justice—a duty all persons have—successfully accounts for their narrow political obligation.

Natural duties, as Rawls observes in *Theory*, apply to us regardless of our voluntary acts—we have them simply because we are persons—and without regard to the institutional background that exists.[2] The institutional background, however, can affect what the duty actually requires of us: When our state is nearly just, our natural duty of justice requires, on Rawls' view, that we obey the laws of that state. According to Rawls, the duty of justice requires of us that:

> [F]irst, we are to comply with and do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves.[3]

[1] Rawls does think, however, that the duty of fairness can account for the special political duties of public officials. See Rawls (1999d), 302-303.
[2] Rawls (1999d), 98, .
[3] Rawls (1999d), 99.

For Rawls, then, an individual's natural duty of justice requires that she do her part in the scheme in which she finds herself, at least when that scheme is nearly just. And so, when the basic structure of a society is nearly just, every member has a natural duty to comply with the society's laws.[4]

Rawls' own argument relies on a claim about what duties the parties in the original position would agree to have citizens bear, once they have settled on the two principles of justice as fairness to govern the basic institutional structure.[5] While the argument for the two principles is, of course, central to Rawls' view, a full conception of right must include more than just the principles governing the basic institutional structure; it must also include principles specifying how citizens themselves must act *qua* citizens, for much of the work of justice on the ground is done by citizens interacting with one another. And so, these duties of citizenship must be chosen as well by the parties in the original position if they are to settle on a full conception of justice.[6]

Rawls argues that the parties would reject any principle holding that citizens have a duty to comply with the law only if they perform some voluntary act—such as consenting or voluntarily accepting benefits—to

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[4] Rawls (1999d), 294.

[5] The original position is a special (imaginary) choice situation in which free and equal persons together agree on basic principles of justice to which they can all commit themselves. The distinguishing feature of this choice situation is that all persons in it are behind a "veil of ignorance": They do not know their (or anyone else's) personal characteristics or their (or anyone else's) particular social circumstances. As Rawls puts it, "no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like" (Rawls (1999d),). It is largely because of the nature of this veil of ignorance that the basic principles the persons in the original position choose to govern their social and political life count as the basic principles of *justice*.

[6] As Rawls says, the principles of natural duty "are an essential part of a conception of right: they define our institutional ties and how we become bound to one another. The conception of justice is incomplete until these principles have been accounted for" (Rawls (1999d), 293).

assume that duty.[7] And they would because of how important the public knowledge that citizens are guided by an effective sense of justice is for the stability of the political institutions. If voluntary action were needed in order for someone to have a duty to comply with the law, citizens would be unable to trust that their fellows are indeed obligated to comply, for they could not be sure that their fellows have performed the requisite voluntary actions. Such uncertainty, Rawls argues, would threaten the stability of political institutions, institutions whose existence no citizen may reasonably object to since they already satisfy the two principles of justice.[8]

The main objection that has been offered against Rawls' account is that it fails to satisfy what A. John Simmons has called 'the particularity requirement' for a successful account of political obligation.[9] This requirement holds that a successful account must explain why a citizen is obligated to obey the law of her own state and not the laws of any other.[10] One consequence of this requirement, Simmons argues, is that, in investigating political obligation and its possible bases, we need only concern

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[7] Rawls (1999d), 296.

[8] Leslie Green argues that Rawls' argument here makes the assurance problem "seem more serious than it in fact is by oversimplifying the sources of stability that can be expected in a just society." There will, he says, be various other sources of stability, and, regardless, the role of consent "is not to be established as a stabilizing device for social order, but as a legitimizing device" (Green (1988), 178). Green here seems to beg the question against Rawls, for it is not clear that, once a society satisfies the two principles of justice, there is any need for consent as a legitimizing device; and, if it is not needed, then, the fact that requiring it *may* contribute to instability is sufficient for rejecting it. Simmons argues in a similar vein: "But the 'protection' provided by requiring a voluntary act (such as consent) for the generation of our political bonds was not *just* protection against becoming bound to unjust regimes. It was protection against becoming bound to *any* government we find unsuitable, just or unjust" (Simmons (1979), 144). What is really at issue here is whether law (or the state) is a morally necessary institution: If it is, then the citizen cannot insist on consent as protection from being bound to *any* law. It is only if it is not that consent can play the role Simmons has it play. This chapter's argument is that authoritative law is a morally necessary institution.

[9] Simmons (1979), 31-35.

[10] By 'her own state,' an account might mean either the state of which she is officially a citizen or the one in which she lives. Both ways of understanding 'one's own state' satisfy the particularity requirement.

ourselves with "those moral requirements which bind an individual to one *particular* political community, set of political institutions, etc."[11] George Klosko agrees with Simmons on this point: a successful account of political obligation, he argues, should vindicate the strong feeling of most people that "they are bound especially closely to the societies of which they are citizens or within which they reside."[12] As both Simmons and Klosko note, the particularity requirement is easily satisfied by accounts that focus on some "special relationship" the citizen has entered into, either with a state or with her fellow citizens. Consent accounts and fairness accounts are, of course, two prominent examples.

As Leslie Green explains, the particularity requirement is thought to have some bite to it, ruling out some otherwise promising grounds for political obligation:

> The consequences of [the particularity requirement] are wide-ranging, for most ordinary moral reasons do not respect the boundaries of states in the appropriate way. While they might be able to explain the duties to humanity in general, they can make little sense of narrower, more particular bonds. On grounds of justice and utility, South Africans may be more tightly bound to the laws of Sweden than to their own. […] But we nonetheless feel that political obligation, if it exists at all, stops at borders in ways that these other considerations do not.[13]

As Green's example suggests, the worry about the natural duty of justice account is that it ties people, not in a special way to their own states—as the particularity requirement demands—but rather in the same way to all just states. And it does this, the worry goes, even to citizens of nearly just states,

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[11] Simmons (1979), 31.
[12] Klosko (1992), 4. As we saw earlier, Klosko defends what he takes to be a successful account, while Simmons argues that none of the current kinds of accounts can succeed.
[13] Green (1988), 228. Simmons makes similar remarks about the particularity requirement at Simmons (1979), 31.

since what is relevant for the duty of justice is that the state is just—a property it shares with other states—and not that they live in the one state rather than those others. As Simmons puts the objection, "General duties to promote justice or happiness can bind me no more to, say, pay taxes to my own just state than they can to make contributions to some needier just state elsewhere."[14] And Ronald Dworkin expresses it by saying that appealing to the justice of states in this way is inappropriate because justice is "conceptually universalistic."[15]

While the particularity requirement seems a justified constraint on account of political obligation, the objection that Rawls' account fails to meet it does not seem to me to succeed, and it does not because it misunderstands the duty of justice. The objection takes the duty to support just institutions to be the uncontroversial core of the natural duty, with compliance, when required, simply a way of supporting an institution, and it presupposes that this duty to support is a duty, in a sense, for me to realize as much justice in the world's various institutions that I, as an agent, can (consistent with the 'without too much cost to myself' proviso, of course).[16] The thought seems to be twofold: (1) there is value in justice being done in the world, even when you are not among those whom it is being done; and (2) the value realized by the justice of an institution—the justice it does and/or the just way it operates[17]—gives all persons the same sorts of reasons for action, namely, reasons to promote those

[14] Simmons (2001b), 138
[15] Dworkin (1986), 193. Waldron calls this objection "the 'special allegiance' objection." See Waldron (1993), 5-7.
[16] This emerges especially clearly in Simmons' discussion in *Is There a Duty to Obey the Law?* See Wellman and Simmons (2005), 158-162.
[17] Now, Simmons specifically denies that institutions can be necessary for doing justice in the world. This duty of justice, then, is a duty to see to it that those institutions that do exist and will continue to exist operate in a just manner.

institutions.[18]

On this understanding, then, the duty of justice operates in a way similar to the duty of beneficence. This latter duty we owe to all *qua* persons, and, considered by itself, it calls on us to devote our beneficence-resources where those resources will do the most good. If I have a choice between sending $50 either to the local homeless shelter or to Darfuri refugees in Chad, the duty of beneficence, considered by itself, will presumably say that I ought to send the money overseas to Chad, for that money will do the most good there. Similarly, if we take the duty of justice to be simply a duty to promote the occurrences of justice being done in the world, then I should apply my justice-resources where they will most effectively help to achieve justice (even if merely procedural/formal justice); this duty, considered by itself, then, could very well require that I support a rule-of-law initiative in a former Soviet state instead of paying taxes to my government as required by the law.[19]

Dworkin, for example, understands the duty of justice in this way in *Law's Empire*. Consider his claim that, though we cannot use the duty of justice to explain in the right way the special tie between a citizen and her state, we can use it to construct "a practical, contingent" argument for

[18] As Simmons points out, this duty to promote justice being done in the world can be understood as either a teleological (or consequentialist) duty or an imperfect deontological one. In other words, the duty to promote justice can be either a duty to maximize the amount of justice in the world—assuming, of course, that it even makes sense to talk of 'amounts of justice'—or a duty to make the ideal of a just world one of the ends of your actions. See Wellman and Simmons (2005), 166 fn46.

[19] As Simmons suggests, taking the duty to be an imperfect deontological one would fit better with Rawls' overall view. See Wellman and Simmons (2005), 160. On this interpretation, one can see how, if the ideal of a just world is an obligatory end one has adopted, supporting a rule-of-law initiative in a former Soviet state would do more towards realizing this end than paying one's taxes. The basic requirement that one do the most one can with what justice-resources one has is a feature not only of consequentialist duties but can also be a feature of imperfect deontological ones.

something like the special tie. Britons, he suggests, should comply with British law because "Britons have more opportunity to aid British institutions than those of other nations whose institutions they also think mainly just."[20] Britons ought to obey British law, then, only because doing so happens to be the most effective way for them to promote justice in the world. Dworkin rightly finds this way of explaining the special tie unsatisfactory, for, on it, there is nothing special about Britons being specifically British citizens.[21] And he is right to suggest that such a 'practical' account is the sole option available when we understand the duty of justice simply to be a duty to promote the instances of justice being done in the world.[22]

But Rawls is clearly after something stronger than Dworkin's 'practical, contingent' tie. Indeed, he seems to accept something like the particularity requirement: we have a duty to comply, he says, only with the laws of that state that 'applies to us.'[23] Call this claim Rawls' application proviso. Now, Simmons argues that, if Rawls' natural duty account is meant as an alternative to voluntarist accounts, this application proviso must be arbitrary. Rawls' account, he claims, is faced with a dilemma: "There is *nothing* morally significant about the 'weak' or 'territorial' senses of application, which hold when I am simply 'specified' by the institution's rules or live in an area in which they are enforced;"[24] but, he continues, any morally significant sense of application—say, it applies to me because I have consented to it or because I

[20] Dworkin (1986), 193.
[21] Simmons sketches a similar 'practical' argument and also finds it unsatisfactory. See Simmons (1979), 154-155 and Wellman and Simmons (2005), 164.
[22] And so, as Simmons argues, there is something misleading about Rawls' two-part formulation of the duty, for it seems to privilege compliance with the laws of one's state. See Wellman and Simmons (2005), 162. But it is only misleading if the second part of the formulation is, as Simmons thinks, the core of the duty.
[23] Rawls (1999d), 99. Waldron notices this about Rawls at Waldron (1993), 6.
[24] Simmons (1979), 150.

have voluntarily accepted some benefits from it—will already bring obligation along with it, making the duty of justice no more productive of political obligation than the relevant voluntarist account.[25] There is, Simmons argues, no morally significant sense of application available for use in a freestanding natural duty of justice account of political obligation.

Simmons is right that a natural duty of justice account, as he understands it, is faced with this dilemma. That you live in a certain territory or are claimed by an institution's rules cannot matter here, for there is no necessary connection between residency or claimed application and effectiveness at promoting justice, and effectiveness is what should guide someone acting to fulfill her duty of justice. But it is only because Simmons here presupposes that the duty of justice is simply a duty to promote justice being done that he is unable to see Rawls' application proviso to the duty to comply as anything but an arbitrary and so unsuccessful attempt to satisfy the particularity requirement. And Simmons (as well as Dworkin, Green and Klosko) are mistaken in taking the natural duty of justice to be simply a duty to promote justice being done in the world.

Justice is not simply something to be promoted. From the perspective of justice, it is not always required that the person promote, as far as she is able, the occurrences of justice being done in the world. That justice is done in the world is certainly valuable, and, as valuable, there is some reason for us to promote it wherever it might occur; to this extent, Simmons and the others are certainly correct. However, promoting its occurrence is not the only thing (or even the main thing) that the value of justice gives persons reason to do. Consider an analogy with friendship. As T.M. Scanlon explains in *What We*

[25] Simmons (1979), 151.

Owe to Each Other, we are right to value friendship, but the value of friendship does not give us, first and foremost, reason to promote either the occurrence of friendships in the world or the health of those that exist, though we do have such reasons. Rather, it gives us reasons, first and foremost, to be good friends to those friends we have. As Scanlon puts it, "we would not say that it showed how much a person valued friendship if he betrayed one friend in order to make several new ones, or in order to bring it about that other people have more friends."[26] We would say, instead, that this person has profoundly misunderstood friendship and its value. What friendship gives persons reason to do, first and foremost, are those things with and for their friends that friends do for one another and in those circumstances in which friends do them.[27]

The value of friendship, then, gives us important reasons to remain loyal to the friends we have, even at the expense of sometimes failing to promote the occurrence of friendships overall.[28] My suggestion here is that we understand justice as a feature of relations among persons. On this understanding, the value of justice being done in the world—or, the value of

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[26] Scanlon (1998), 89.

[27] As Scanlon puts it, "A person who values friendship will take herself to have reasons, first and foremost, to do those things that are involved in being a close friend: to be loyal, to be concerned with her friend's interests, to try to stay in touch, to spend time with her friends, and so on" (Scanlon (1998), 88).

[28] Scanlon intends this point about friendship to argue against teleological conceptions of value, that is, those conceptions that hold that states of affairs are the bearers of intrinsic value and what agents have reason to do is to act so as to bring about the those states of affairs that have the greatest value. See Scanlon (1998), 78-95. Scanlon's claim is that we have reasons of friendship that have little to do with realizing the existence of more friendships in the world. This sort of argument might also be an argument against consequentialism, or at least against certain act-consequentialisms. For arguments to that effect, see Bernard Williams's "A Critique of Utilitarianism" (1973) and Michael Stocker's "The Schizophrenia of Modern Ethical Theories" (1976). For a sophisticated defense of consequentialism against this sort of argument, see Peter Railton's "Alienation, Consequentialism and the Demands of Morality" (1984), and, for a respnse to Railton's defense, see Neera Badwhar Kapur's "Why It Is Wrong to be Always Guided by the Best: Consequentialism and Friendship" (1991). For a helpful overview of consequentialism that places this debate in context, see Philip Pettit's "Consequentialism" (1991).

relations of justice among persons—is importantly similar to the value of friendship: justice gives us reasons, first and foremost, to interact with those persons around us in a just way, even if doing so requires passing up chances to promote the occurrence of just relations overall. And so, from the perspective of justice, we have reason, first and foremost, to be just towards those with whom we find ourselves intermingled.[29] Friendship and justice are, of course, different valuable ideals of interaction, each requiring that we interact with certain people in certain distinctive ways. What is true about both is that our interacting with them in the relevant ways takes priority over seeing to it that others interact with each other in those ways as well.[30] In this way, justice itself may recommend against supporting rule-of-law initiatives in former Soviet republics, if paying those resources in taxes is required for you to realize just relations with your fellow citizens. Indeed, justice may even recommend something different than beneficence in the first example above: it may recommend that you send your $50 to the local homeless shelter rather than to Darfuri refugees in Chad.[31]

The natural duty of justice, then, is better understood as a duty, first, to be just in one's relations with others and, second, to promote just relations among people generally when doing so is not too costly.[32] How is it that

[29] As Kant puts it, the question of justice concerns most immediately how we are to interact with those with whom we "cannot avoid living side by side" (Kant (1996a), 451 (6:307)). In other words, it concerns most immediately those we interact with in the process of living out our lives.

[30] In this way, the value of friendship and justice have to do with realizing, in one's actions, a certain kind of relation with others rather than realizing, as a result of one's actions, a certain state of affairs. Now, justice as an ideal of interaction is more complicated than this suggests, since its realization requires the cooperation of very many people: I cannot achieve justice with only one of my neighbors; I must achieve it with all (or most) of my neighbors if I am to achieve it with any.

[31] Of course, what my all-things-considered duty is in this sort of situation remains to be seen. The point is merely that justice and beneficence may recommend different actions.

[32] There remarks about justice are consonant with Scanlon's characterization of the value of morality overall as that of realizing a certain kind of relation of mutual recognition: the

clarifying the content of the duty of justice helps Rawls' account of political obligation to satisfy the particularity requirement? It may be that a person's relations with certain others, if they are to satisfy the duty of justice, must be mediated or governed by some institution. And, if such a required institution exists and is capable of doing this mediating or governing work in a just manner, then this institution 'applies' to that person in Rawls' sense and it does so non-arbitrarily but also absent consent or any other voluntary transaction: complying with the institution is the way (or part of the way) for her to accomplish the morally necessary task of realizing relations of justice between herself and those others. An institution applies to a person, then, when it successfully and justly administers some task that is required by justice but that she cannot administer on her own. In this sort of situation, then, the natural duty of justice can require of her that she comply with the directives of a particular institution, whether or not she consented to that institution's authority.

As Jeremy Waldron points out in "Special Ties and Natural Duties," "the assumption of the natural duty approach is that the pursuit of justice is a moral imperative."[33] And Rawls' account relies on a basic claim that, even though each person possesses a natural duty of justice, upholding justice is not something that she can do on her own: she needs the cooperation of others, cooperation governed by institutions.[34] And so, if others around her

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relation of "living with others on terms that they could not reasonably reject" (Scanlon (1998), 162).

[33] Waldron (1993), 28. This assumption is obscured in Rawls' account in *A Theory of Justice*, mainly because his overall project simply assumes that justice among persons in society requires the existence of basic political institutions. Rawls is not arguing against philosophical anarchism in *Theory* but against rival justifications of the liberal state.

[34] This claim helps to explain the weakness of the second half of Rawls' duty of justice: Since establishing just institutions requires the cooperation of others, efforts are quite likely to be ineffective when not accompanied by others' cooperation. And so, she cannot be *required* to bear large costs herself in the absence of cooperation. Now, were such cooperation

are engaged in that cooperative task and reasonably successful at it—because, say, they have set up the social and political and legal institutions is required for upholding justice among them—her natural duty of justice requires that she participate with them in that task—and so that she obey the law—for doing so in these circumstances is what it takes for her to realize just relations with them.[35]

Your natural duty of justice can give you a duty to support and comply with those institutions whose operations are both necessary for and actually capable of achieving justice among you and your fellows. Establishing that the natural duty of justice gives you a duty to comply with some institution, then, requires establishing two things: (a) that the institution operates in a just manner; and (b) that it accomplishes some task required by justice that only an institution can accomplish. Simmons' voluntarism about political obligation is ultimately mistaken because there are some institutions that meet condition (a) that also meet condition (b): if some institution accomplishes a task *required* by justice, it is inappropriate for a person to insist on grounds of freedom that, even if the institution also operates in a just manner, she has the normative power to decide whether or not it applies to her and to her interactions with others.

Consider the example Waldron offers in "Special Ties and Natural Duties" of a justice-required institution:

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forthcoming, she may be required to bear large burdens to establish just institutions, at least if they are to govern her relations with others.

[35] The boundaries of such a political community—who is included and who is excluded—remain an open yet important question. The natural duty of justice account holds that you have a duty to be just towards everyone, whomever they might be, but it remains to be determined what is required for you to be just towards them, and how one interacts with them, if at all, might affect what is required. For instance, that certain cooperative schemes exist that give you a duty of fairness owed to certain others—those who are members of the scheme—will be an important kind of interaction.

> Suppose the benighted souls off in Montana were to set up an institute to give aid to the homeless. Suppose, moreover, that the founders of this institute were right in thinking that their organization is not only just in sense (a)… but just also in sense (b). They believe that the homeless are entitled, as a matter of justice not charity, to much more than they are currently receiving under state welfare arrangements. If they were right about that… then, assuming their institute was effective and not competing with any other organization to address this problem, the theory of natural duty *might* yield the conclusion that we are morally bound to support it.[36]

The thought, here, is that the homeless among us are owed more resources as a matter of justice. And this resource-transfer is a demand of justice prior to the creation of the institute; each of us simply lacked the right kind of mechanism to accomplish this transfer.[37] When others created this morally necessary distributive institution, they created the tool we needed and, as such, the institute now applies to us. It is inappropriate to insist that it does not because we have not consented to it, for requirements of justice are not things that apply to us only if we have consented to their application.[38]

However, even if Waldron's example of how an institution can come to apply to us in such a way that we have a duty of justice to take advantage of that institution is plausible (as I think it is), it nevertheless does not show that we would have a duty to comply with the institution's particular judgments of how we are to take advantage of it. In Waldron's example, our duty of justice gives us a duty to take advantage of the institute's distributive reach by giving it a portion of our resources. But the duty is not yet a duty to obey the

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[36] Waldron (1993), 30.

[37] Granted, this is not obvious. One might think it odd to say that each of us was somehow required to transfer money prior to the existence of the mechanism for transfer. It is right to say that, since the transfer could not be done, we could not have an duty to do it. But that does not imply that that we did not owe the homeless more resources, as a matter of justice, prior to the existence of the transfer-mechanism, for that is what gave us reason to put the mechanism in place.

[38] Now, Simmons agrees with this claim that requirements of justice apply to us regardless of our consent. What he denies is that any such authoritative institutions are required by justice.

institute's directives about what we owe, for a duty to obey is not simply a duty to give a certain portion our resources but rather a duty to give the portion of our resources that the institute judges we ought to give because it has so judged. That we owe some portion of our resources is one thing; how much we owe is another. More must be said, then, to establish that Waldron's institute has authority over the question of how much we owe, as a matter of justice, to the homeless. In other words, Waldron's example shows how we can have particular political duties of justice but fails to show how we can have narrow political obligation.[39] So far, then, Rawls' natural duty of justice account of a duty to comply is incomplete for it is not enough to establish that an institution is necessary to accomplish a task required of justice. We must also show that authority is necessary for this task. Fortunately, we can fill in this part of the account with a satisfactory argument for the duty to obey by looking at Kant's account in *The Metaphysics of Morals*.

2. A KANTIAN ACCOUNT

On Kant's social contract account of the state and of citizens' duties to comply with the law in *The Metaphysics of Morals*, authoritative law is, in some sense, necessary. And it is necessary, for Kant, even on the assumption that persons in the state of nature make only fully conscientious decisions in good faith with a deliberative faculty unclouded and morally aware. In other

[39] You might wonder whether such an institute could really function without practical authority over the question of what persons' duties actually require of them here. It is not obvious, though, what survival advantage practical authority is supposed to grant, for it is not clear, that, say, the permission to coerce attaches only to authority, and the permission to coerce seems to be what is important here. Also, even without practical authority, the institute, if it is reasonably effective, will likely have an informational advantage that will give it substantial theoretical authority over the question of persons' duties for many within its scope. Of course, this sort of theoretical authority is not practical authority, since there will be some knowledgeable persons who, because of this knowledge, are not subject to the institute's theoretical authority.

words, it is necessary no matter how morally good the persons concerned are.[40] Kant's necessity claim is not a claim that it would be maximally rational or advantageous for such persons to submit, along with others, to the authority of law.[41] Instead, Kant asserts that, in a state of nature, even fully moral persons will have a moral duty to submit with others to the authority of law, or, as he puts it, they will have a duty to enter into "a civil condition" with them governed by "a public lawful external coercion."[42] And he grounds this moral duty by appeal to the value of freedom: on Kant's view, a state of nature in which all persons rightly assert their freedom while trying conscientiously and in good faith to respect the equal freedom of others is a situation that would inevitably lead to objectionable domination by the strong. Kant's account, then, is particularly important here, for his natural duty of justice account of narrow political obligation has the same starting point—the value of freedom for persons—as Simmons' arguments against all but consent-governed political obligation.[43]

Kant's account makes use of the state of nature as an idea of reason: we are to imagine relations among unrelated persons in circumstances devoid of any institutions of practical authority governing their interactions. Each person in such a state of nature, Kant says, "has [his] own right to do *what seems right and good to* [*him*] and not to be dependent on another's opinion

[40] As Kant puts it, "however well disposed and law-abiding humans might be," a state will be necessary (Kant 6:312).
[41] If it were, Simmons' consent argument would hold: If the question concerns what is advantageous for a person, it should be up to that person herself to judge whether to access that advantage by submitting to authority via her own consent, for she may judge in light of her own projects not to access it. And having this sort of opportunity to exercise judgment—whether she judges rightly or wrongly—is required if she is to be genuinely free.
[42] Kant (1996a), 456 (6:312).
[43] For recent discussions of Kant's account, see Jeremy Waldron's *The Dignity of Legislation* (1999), Ch. 3; Paul Guyer's *Kant on Freedom, Law and Happiness* (2000), Chs. 7 and 8; Otfried Höffe's *Kant's Cosmopolitan Theory of Law and Peace* (2006); and Arthur Ripstein's *Force and Freedom* (2009).

about this."[44] Kant's state of nature, then, is defined in the same way as Simmons' (and Locke's): no one is subject to any political authority. It must be noted that, just as in Locke's and Simmons', the demands of morality are still in force in Kant's state of nature, including, as Waldron points out, the requirement that the maxims of one's actions pass a universalization test.[45] What is special, then, about the state of nature is that each person has a right to treat his own moral judgment—the results he gets in his own deliberations from conducting the universalization test himself—as properly determinative of his actions. In Kant's state of nature, then, each person possesses full deliberative control. And, we shall stipulate, each person tries her best to act morally: she only acts according to maxims that she in good faith does believe passes the universalization test.[46] Even in this sort of case, authoritative law is necessary.

Kant begins his account with the claim that there is only one *innate* right—or, only one original right that persons possess *qua* persons—which is the right to freedom: "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity."[47] For Kant, then, a theory of right must take

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[44] In the state of nature, "each follows his own judgment" and, as we will see, the result is that "rights are *in dispute*" (Kant (1996a), 456 (6:312)).

[45] Waldron (1999b), 54. We should take this universalization-test requirement to stand in for whatever is required for appropriate moral deliberation, since it is not clear that Kant intended the universalization test sketched in the *Groundwork* to govern moral deliberation in the way Waldron's discussion here suggests.

[46] This stipulation is important because, if authority is still necessary, then a person cannot complain that it is only because others have failed to act morally that authority is necessary and that she cannot be subjected to an authority simply because of these others' failures. As will become clear, it is because a person cannot make this sort of complaint that Kant's natural duty of justice account escapes Simmons' argument that this person's consent is necessary.

[47] And, as Kant explains, it contains (or, "already involves") certain "authorizations": (1) "Innate equality, that is, independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being *his own master*… as well as being a

persons' equal right to freedom as the controlling consideration: the purpose of a system of right is to guarantee for everyone equally the opportunity to enjoy this innate right.[48] In this way, Kant's account is similar to Rawls', since, on Rawls' account, the correct principles of justice are those that govern social life among free and equal persons.[49] And, as we saw in an earlier chapter, Simmons claims that the natural rights persons possess may be understood together as a natural right to freedom as self-governance.

On Kant's view, that persons possess the right to freedom justifies holding that, when there is more than one individual around in the world, each individual must be able to acquire and possess property.[50] In the state of nature, everything in the world, prior to any individual act of acquisition, is owned in common by everyone, and so everyone has the same rights against everyone else with regard to things: no one may interfere with my bodily possession or current use of a thing. This right, however, is not a property right, but instead a right to bodily integrity: the wrong is done directly to me and not to me through my property, since I have none (once I put the thing down, anyone may permissibly take it for her own use).[51] Genuine property rights, for Kant, are rights an individual has against others to some thing even when she is not in physical possession of that thing.[52]

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human being *beyond reproach*… since before he performs any act affecting rights he has done no wrong to anyone" (Kant (1996a), 393-394 (6:237)).

[48] Kant, "Theory and Practice" (1996b), 291 (8:290). For discussion of the idea of a system of equal freedom for all, included a response to the objections that we cannot make sense of equal freedom without brining in other values to determine which particular liberties to favor over others, see Ripstein (2009), 31-39.

[49] According to Paul Guyer, Kant's innate right to freedom "is virtually identical to Rawls' first principle of justice" (Guyer (2000), 277).

[50] See Ripstein (2009), 66-69.

[51] Guyer (2000), 244.

[52] Kant distinguishes between "intelligible" and "merely physical" possession of an object, and a person's 'intelligible possession' of a thing consists in his property rights in that thing, for he has such rights—and so possesses the thing *as property*—whether or not he physically controls it. See Kant (1996a), 401 (6:245).

Property rights are important because, as Ripstein notes, the right not to be interfered with in my bodily possession or use of a thing is not enough for freedom as Kant understands it: "[B]ecause of the way Kant conceives of the relation between having means and setting ends, using things is not enough to extend your freedom; it would merely enable you to succeed at some particular purpose or other."[53] Freedom includes the ability to formulate and adopt ends (instead of merely formulating wishes), and this ability, quite plausibly, requires having things at your disposal. And having things at your disposal—or, having the assurance that certain things will be as you have left them—amounts to having rights against other people that they not to use those things for their purposes even when you are not using them.[54] To own something as property, then, is to have the right to decide to what use it is put and by whom, for this right gives you control over that thing's availability to you as means when you are deliberating about which ends to adopt. Being a free person requires having property, because it provides you with this kind of assurance.[55]

But your right of property in a thing amounts also to a set of duties borne by all other people not to interfere in your control of that thing: they have duties not to prevent you from using it nor to use it themselves without your consent.[56] And, that your right to property amounts also to duties borne by others poses a problem for the acquisition of property in the state of nature.

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[53] Ripstein (2004), 6.
[54] This holds, of course, only on the assumption that there actually are other people in the vicinity, for having these rights is required to have the thing at your disposal only if others might actually use the thing themselves.
[55] Guyer (2000), 279-80. Those familiar with Raz's account of autonomy will notice that Kant's argument about property and freedom is similar to Raz's claim that a person must have a sufficient range of options available to her for her to count as autonomous, since they both emphasize the scope of one's possible choices as relevant for questions of freedom or autonomy. See Raz (1986), 372-377.
[56] Guyer (2000), 248. See Kant (1996a), 409 (6:255).

The problem is that your act of acquisition of some thing as property amounts to your *unilateral* declaration that, in virtue of this declaration, all others are under duties to respect your ownership of that thing: they have duties not to interfere with your assurance of its availability, including a duty to get your consent before using it themselves.[57] Importantly, your act of acquisition includes not only a claim of ownership but also the claim that you have the right to use coercive force against those who fail to respect your ownership, a right that you purport to have created for yourself via the act of acquisition. In this way, to attempt to acquire property in the state of nature, say, according to a principle of first occupancy or to some Lockean principle about mixing one's labor is also to claim the legitimate exercise of a moral power to create duties for others, duties that are solely for the benefit of your own freedom.

The unilateral character of this right- (and duty-) creation is problematic because it seems inconsistent with the equal freedom of others for a person to have this kind of moral power over those others. The innate right to freedom, for Kant, includes a right to "innate equality," which amounts to "independence from being bound by others to more than one can in turn bind them."[58] And, the moral power presumed by this unilateral right-creation is inconsistent with equal freedom, then, because it is inconsistent with innate equality. And, if the unilateral character of this right-creation is inconsistent with others' equal freedom, any coercion she uses to defend her purported

[57] Kant (1996a), 409-410 (6:256). As Guyer puts it, "[T]he consent of others to one's control of property is an ontologically necessary condition of the possibility of the existence of property—it is only the acknowledgement of others that extends one's possession beyond one's mere physical control (Guyer (2000), 280-281). By 'consent' here, I take it Guyer does not mean contractual consent but rather the sort of consent in the broad sense that I distinguished from contractual consent in Chapter II.
[58] Kant (1996a), 393 (6:237).

ownership of a thing will be illegitimate: it will not count as protecting her rightful freedom but instead as violating another's. The problem, then, is how to incorporate property ownership, which is a requirement of genuine freedom as self-determination, into a conception of right providing for the equal freedom of all.

Now, someone might object that there is no such problem, given our stipulation about persons in the state of nature. In claiming the power to acquire property, persons will not be claiming a power that they deny to everyone else, for they will make assertions of property rights to things only when they think that those particular rights can coexist with the freedom of others, a freedom which includes the power to claim property for themselves in the same way.[59] They will only make 'unilateral' claims of property ownership that satisfy this constraint, and they are prepared to recognize others' 'unilateral' claims of property rights that they think can also coexist with everyone else's freedom. Additionally, they use coercive force solely to protect rights, and they recognize the legitimacy of others use of coercive force to protect rights, even against them. And so, the objection goes, even though individual declarations of property rights in the state of nature are unilateral, they are governed by the considerations of reciprocity and so are not problematically unilateral, for they are not incompatible with the equal freedom of all.[60]

This objection does not succeed; the unilateral character of the individual declarations of property rights is a problem even in these

[59] Some of Kant's own remarks actually suggest this sort of objection. See, for instance, Kant (1996a), 409 (6:255).
[60] Waldron discusses a similar objection in Waldron (1999b), 54-5.

circumstances.[61] And it is because persons, when making judgments about the legitimacy of various declarations of property rights will inevitably face disagreements with one another, even when they are judging them conscientiously and in good faith. In these judgments, persons will bear what Rawls calls "the burdens of judgment."[62] The burdens of judgment are, as Rawls explains, "the many obstacles to the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life."[63] The presence of these burdens explains how two people, both motivated by the correct concerns and judging in good faith based on the same evidence, can nevertheless arrive at different, though reasonable, judgments. The obstacles—the complexity of the evidence, the need to weigh a variety of considerations, the necessity of interpretation—all contribute to reasonable disagreement, and bias and irrationality are importantly not a necessary part of the explanation. Since persons will always face these obstacles when deliberating, Rawls explains, reasonable disagreement will be a permanent feature of a free culture.[64] And judgments about the legitimacy of particular declarations of property rights are the kind of judgments subject to the burdens of judgment.

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[61] Kant does allow for 'provisionally rightful' acquisition of property in a state of nature: Given the importance of property ownership to freedom, a person may make unilateral rights claims to property and may defend those claims forcibly so long as she is also willing to enter into a civil condition with others. The idea seems to be that she cannot be deprived of all access to the great good of property ownership simply because others wrongly refuse to enter into a civil condition with her. Kant suggests that such provisional acquisition would be governed by some principle of first occupancy at Kant (1996a), 409-411, 416 (6:256-257, 264). See Guyer, (2000), 283.

[62] Rawls (2001), 35-7.

[63] Rawls (2001), 35.

[64] In "Reply to Habermas," Rawls seems to say (but not explicitly) that the recognition of the burdens of judgment has consequences only for one's attitude towards other people's comprehensive doctrines (Rawls (1996), 375). Also Larmore (2004), 56. As Waldron argues, there does not seem reason not to take the burdens of judgment to have similar consequences for people's judgments about justice, and that our attitudes towards their judgments ought, in some appropriate way, to reflect that. See Waldron (1999b), 153.

The upshot of this for what Kant is concerned about is that individuals in the state of nature, no matter how conscientious or good they are, will reasonably differ in their judgments about the permissibility of their own and others' claims of property rights.[65] An example: Two people each claim neighboring plots of land, but their claims overlap somewhat such that they both claim the same field. They reasonably disagree about whose claim came first, about the legitimacy of the way the other declared her acquisition, or about whatever principle one thinks should govern initial acquisition of unowned things.[66] But each of them, having taken everything into account, is convinced that she is right and so is convinced both that she owns the disputed field and that she has the right to use coercion to prevent the other from interfering with her control over it.[67] (And, given the nature of their claims, this is not something about which they can simply agree to disagree.[68])

The following is a passage in which Kant, in his opaque way, sets out the problem of disagreement in the state of nature:

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[65] I am not assuming here that there are, in fact, no right answers to these questions; in fact, I am assuming throughout that there are. However, that there are right answers is not politically relevant here, for neither person possesses uncontroversial access to these right answers. See Waldron (1999b), 164-187. Ripstein misinterprets Waldron (and Waldron's explanation of Kant) on this score by taking Waldron to be writing "as though questions about the basic terms of social life have no answers but somehow require them, so that institutions must step in to answer them" (Ripstein (2009), 169). The claim, instead, is that, since we will unavoidably and reasonably disagree about what the right answers are, institutions must step in to answer them.

[66] You might wonder whether these things are vulnerable to reasonable disagreement, since the dispute concerns a question of historical fact ('Just look to see who was there first,' you might say.). But even this sort of question can require judgment and interpretation. The latter two things do seem complex enough that reasonable people can disagree about them. And even the first one may be as well, if the disagreement revolves around whether the other's claim in the particular case met the criteria for a legitimate claim.

[67] Even, I'm assuming, the fact of the burdens of judgment.

[68] Now, you might wonder, since they both recognize that they face the burdens of judgment, why they ought not compromise by meeting the other halfway. The problem is that, even if they both are willing to compromise, they may reasonably disagree about the appropriate compromise. This is bound to be likely, since the question of what would be the appropriate compromise just adds considerations of fairness into an already complex set of considerations. (This assumes, of course, that the dispute is the sort of thing that admits of compromise. Not all such things will.)

> [H]owever well disposed and law-abiding human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established [or, in a state of nature] individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this.[69]

In the state of nature, individuals possess the right to decide for themselves. But they also possess the duty to stand up for themselves and what they take to be their rights: "Rightful honor… consists in asserting one's worth as a human being in relation to others."[70] When, because of the burdens of judgment, two individuals come up with different answers about a question of right, they face an impasse: neither has a duty to defer to the other's judgment and each must, because of the duty to stand up for oneself, resist being forced to accept the other's judgment. However, since using force in the service of right is legitimate—matters of right are just the sort of thing that may be enforced—each person will rightly see herself as having good reason to use (legitimate) force in defense of what she reasonably takes to be her rights.[71] Violence, then, will be the result, and the stronger of the two will end up with the land.[72] And so, in the state of nature, what will end up *counting as*

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[69] Kant (1996a), 456 (6:312).
[70] Kant (1996a), 392 (6:236). For discussion of Kant's notion of rightful honor, see Höffe (2006), 121-124. If you find the claim that persons have duties to themselves implausible, all this argument needs here, I think, is that persons have at least a right of rightful honor to stand up for themselves and their rights, a right that I take to be relatively uncontroversial. As I find the claim plausible, I have refrained from weakening rightful honor in this way. For a brief defense of duties to oneself, see Raz (1989). For discussion of duties to oneself as derived from obligatory ends, see Herman (2007).
[71] See Kant (1996a), 387-390 (6:231-3).
[72] Of course, violence is only the result if each stands up for himself. As this duty to do so is only one duty among others—and so it can be overridden by others—one need not always stand up for oneself, say, if one knows one will lose the fight. For Kant, though, there is still a moral problem, because, were each to stand up for himself, violence would be the result. In a situation where the other person is so strong that standing up for oneself is irrational because one is bound to lose it still a situation where the stronger ends up with the land under dispute.

right—that is, what will end up organizing the distribution of 'property'—will be the judgments of the strongest because they are the strongest.[73]

And, on Kant's view, such rule by the judgment of the strongest is not at all rule according to right.[74] And this seems correct: It fails to be rule according to right because, when what counts as right is determined by the strongest simply because they are the strongest, there is no real connection between its status as counting as right and any justification of it as a standard of rightness.[75] Even though the passage can be read as concerned mainly with the problem of violence and insecurity, what is ultimately important and defective about the state of nature for Kant is not the presence of violence or of the threat of violence—they are only *symptoms*—but rather the inability of a morally conscientious person to exercise fully her own freedom while fully respecting the equal freedom of others.[76] Persons have a duty to leave the state of nature because, until they do so, relations of justice among them are impossible: force is the only way for self-respecting persons—those reasonably concerned with their own freedom—to solve even reasonable disagreements about right. We have reason, then, to enter into a state governed by authoritative law with others not solely because we want to be secure from

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[73] This will hold true even from the perspective of the strongest: their views have won the day not because they were judged by themselves *and* others to be right or better but because they were the views of those who happened also to be the strongest. If the strongest are concerned with justice, they will see that this is problematic. This sort of case is different than the permissible use of force against those resisting a rightful relation.

[74] For instance, he says that to stay in the state of nature is to renounce any concept of right at Kant (1996a), 456 (6:312). See Guyer (2000), 248-249.

[75] Kant calls a situation where people deal with each other "only in terms of the degree of force each has" as "a state *devoid of justice*" at Kant (1996a), 456 (6:312). This would seem to apply even to a situation where each reasonably took himself to be acting in the service of right but, because they disagree, each resorts to force in defense of right: they here end up dealing with each other, in the end, 'only in terms of the degree of force each has.'

[76] Violence itself is still a problem that must be solved, since the security of a person's rights is important for her freedom. As Kant requires, the law must be backed by public coercive force. The claim here, though, is that reasonable disagreement about justice itself—and the violence that results from it in particular—poses a distinctive problem.

violence ourselves—though this security is something we're right to want—but because we ought morally to see to it, insofar as we can, that we all are secure from violence in the right way.

I take it this is what Kant means in the (also rather opaque) passage immediately after the previous one:

> So, unless it [i.e., an individual, a people or a state] wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows his own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate *power* (not its own but an external power); that is, it ought above all else to enter into a civil condition.[77]

On Kant's view, to have one's positive rights determined by legitimate law is the antithesis of having them determined by force or strength alone; what counts as law, then, must have some connection to rightness. The fundamental problem of the state of nature, then, is that there is not an authority—a mechanism, procedure or person—that has the power to resolve reasonable disagreements about right such that those subject to it have a duty to accept the resolution. Authority is necessary because it is what can give right in that community the necessary univocity such that everyone's property rights are consistent with the equal freedom of all and the exercise of force to protect those rights plausibly counts as legitimate coercion. Even if not right in its every exercise, lawful governmental coercion in defense of such legally defined rights is at least the right *kind* of enterprise.[78]

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[77] Kant (1996a), 456 (6:312).

[78] Since persons will reasonably disagree about rights and justice, they will reasonably disagree about whether the law's conceptions of rights and justice are correct. In this way, such disagreement is inevitable, even in a state with authoritative law. But, in a state with

On Kant's view, justice is ultimately something groups of people must pursue in common because individual judgments about justice face the burdens of judgment, and so an individual acting purely on her own judgment cannot achieve justice in her dealings with others, for they may reasonably be unable to recognize her dealings with them as just. As he says about the state of nature just after the passage above, "[b]ut it [the state of nature] would still be a state *devoid of justice*… in which when rights are *in dispute*… there would be no judge competent to render a verdict having rightful force."[79] To resort to violence to resolve disagreements about right, then, is to abandon the possibility of standing in full relations of right with the relevant others.

And so, not only will the natural duty of justice, understood broadly as a duty to respect others' equal right to freedom, justify establishing institutions of property governing a group of persons but also, under the right circumstances, recognizing the administration of the scheme of property as authoritative for those persons. And, it seems to me, this sort of account need not be confined to property rights: any institutional scheme of rights and duties will, because persons' judgments of them face the burdens of judgment, require an authoritative administration.[80] In this way, institutions that attempt to accomplish a task required by justice may, on grounds of justice, have authority over us.

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authoritative law, this disagreement no longer poses the problem for persons' equal freedom that it poses in the state of nature.

[79] Kant (1996a), 456 (6:312).

[80] Waldron notes that even rights and duties that seem, at first glance, fairly straightforward are subject to reasonable disagreements and so require authoritative definition and administration. Take the case of rape: While the core cases of rape are straightforward, there are important questions at the boundaries—e.g., the age of consent and so the definition of statutory rape—that are subject to reasonable disagreement among citizens.

3. SIMMONS' OBJECTIONS

Kant's main claim is that an individual in the state of nature would have a duty of justice to leave the state of nature and enter into civil society, so long as a rightful civil society exists; if there is none, she would have a duty to do what she could to establish one. Rawls' main claim is that those who find themselves claimed by a nearly just state have a duty to comply with its laws; if they are claimed by some other sort of state, they have a duty to do what they can for the task of making it just. Simmons has offered some forceful objections to this natural duty of justice view, and the virtues of this view come out clearly, I think, when we try to respond on its behalf to these objections.

3.1 The no-injury objection

Simmons' first objection takes issue with the claim that remaining in the state of nature can, by itself, count as injuring those who have exited the state of nature and entered into civil society with each other. As Simmons says,

> Kant never explains very clearly… why, if others are willing members of some secure civil society, my mere refusal of reciprocal membership (without further wrongdoing) constitutes any kind of injury to those who already have the security they desire. […] If my refusal of membership is public and if I respect the rights those members possess *qua* persons, any threat I represent will be relatively minor and easy to counter.[81]

This objection relies on the claim that the point of a state's coercive legal system is to provide the (substantial) benefit of security to its members, and, since it is merely a benefit that I am not required to help provide them, I am

[81] Simmons (2001), 140-1.

morally free to reject membership in the political scheme.[82] Justice, on this view, only comes into the picture as a constraint on permissible schemes for providing security.

Simmons is right to think security a benefit, and a natural duty of justice account such as Rawls' or Kant's can admit that the legal system must be successful in providing it, since security is required for the free exercise of one's right. But providing security, while required, is only one aspect of the distinctive purpose of a coercive legal system, which is to harmonize individuals' spheres of freedom so that all may enjoy their equal right to freedom. And Kant's point is that this harmonizing is not something I can attempt to do myself and still fully respect others' rights as free persons: I cannot simply implement in my own actions my preferred conception of equal freedom consistently with everyone else's innate right to freedom, because I must, on account of the effects of the burdens of judgment, deny them a similar right to implement the scheme they preferred. Simmons' mistake, then, is to think that what is at issue here is solely the protection of persons' freedom by providing security from violence (and the threat of violence) and so to think that a person is actually capable of fully respecting others' equal right to freedom, and so those others *qua* persons, while choosing to remain in a state of nature with them.[83]

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[82] This is not quite right: I am required to help provide them the benefit of security, but only to the extent that I am to refrain from being a threat to them. Since, on Simmons' view, this is something I can do outside of the state and since I am not required to provide them with more of this benefit myself—though I am certainly free to do so—I am morally free to refuse subjection to the law.

[83] Simmons asks at one point, "Why doesn't the Kantian say, with the Lockean, that our duties are just to treat others rightly, whether as members of some civil society or not?" (Simmons (2001), 145) Kant, as I've interpreted him, does say that our duties just are to treat others rightly; where his account departs from Simmons' account concerns whether recognizing a political authority's legal directives as genuinely authoritative law can be required by our duties to treat certain others—our fellow citizens—rightly.

By publicly refusing membership, I assert that I retain the right to determine for myself (and so for my relations with others) where my rightful freedom ends and that of others begins. In doing so, I thereby make it impossible for others to establish full rightful relations with everyone around them. In this way, I do wrong them in an important sense because I make it the case that any disagreement with me—reasonable or not—*must* be settled according to the rule of the stronger. I make full relations of right with me impossible for them: they must establish domination over me in order to enjoy what they reasonably take to be their rights. By forcing our relations to have this character, I do wrong "to the highest degree."[84] Now, relations among those others may actually be governed by a legitimate scheme of coercive law. However, that their relations are so governed does not obviate the moral requirement that my relations with those others to be so governed as well, for my relationship with them has moral significance whether or not their security from violence is actually at stake in my refusal of membership.[85]

Consider an example: Bob refuses membership in a nearly just state in which he finds himself. The justification of the state's enforced scheme of property rights is a reasonable one, for it does not rely on gross mistakes in reasoning or on unjustified bias. Bob, though, thinks that the scheme allows for some injustice in the distribution—some people, he thinks, get what rightfully should belong to others—and Bob's belief is also based on a reasonable conception of property rights. Assume, for the sake of argument, that Bob is, in fact, correct, and that some of the instances of injustice affect

[84] Kant (1996a), 452 (6:307-308).
[85] And presumably this security will not be at stake in this sort of case, since they will be collectively much stronger than I am and so will be able easily to neutralize any threat I might pose to them.

him: he is denied some of his rightful property.[86] Suppose Bob goes around and appropriates those things that, on his scheme, are supposed belong to him, and he does so in a way that does not infringe on others' natural rights.

On Simmons' view, Bob's actions would be entirely acceptable, for there is nothing at all morally troubling about them. Bob refuses membership, but does not actually wrong anyone: He only takes what is in fact rightfully his, and his relatively few takings do not endanger this reasonable scheme of property and the benefits it provides those others.[87] Kant's claim is that there is still something importantly morally troubling about his actions, for, even though Bob is only taking what belongs to him, this fact cannot be established among him and those others in a way that leaves no room for reasonable disagreement.[88] He may be judging conscientiously and in good faith, but others, who disagree with him, may also be judging conscientiously and in good faith. These others, then, may quite reasonably regard his actions as theft of another's rightful property and regard themselves as entitled to act accordingly.

Bob's actions, then, are unilateral in a morally problematic way: He must claim to have the standing, as an individual, to enforce (however piecemeal) the distribution of property that he thinks in good faith best, and to claim this standing includes claiming the standing to determine at least those rights and duties of others entailed by his own property rights. And, given the prospect of reasonable disagreement, he must deny a similar standing to

[86] Granted, there are no uniquely right answers for many things having to do with a system of property rights. But, for some others, there will be, and it is these things that concern us here, for Bob can rightly identify the state's answers about them as mistaken.
[87] Simmons' view also seems to hold that coercively preventing Bob from taking those things would be wrong.
[88] That is, it leaves no room for disagreement that's fully explainable by reference to the burdens of judgment and not bias or irrationality.

those persons from whom he takes things. While Simmons might be right to say that Bob can in fact respect everyone's *property* rights while refusing membership in a state with them—if he does in fact have the right conception of property rights—Bob cannot respect their equal right to have a say in the positive scheme of property that will in fact govern their interactions with him, for he claims an exclusive say.[89]

3.2 The consent objection

Simmons' second objection to Kant's account relies on a version of the particularity requirement: "[I]t is not even obvious why Kant thinks a general obligation to enter some civil society entails a special obligation to obey the specific laws of a particular state—namely, that in which I find myself."[90] The worry behind this objection seems to be that, since the number and boundaries of political communities are historically contingent—and are often the result of violence and other severe injustices—and, since people normally enter into a community simply by being born into it, a person's status as a citizen of this state rather than that one is, in these two important ways, morally arbitrary. And so, the worry is, if we are to avoid trying to connect the individual to her state non-arbitrarily by endorsing a kind of political naturalism in which people can be born already with moral ties to particular political communities, any particular obligations she has towards her community must be explained by something other than this duty of justice, since this duty is a duty simply to assume some particular obligation or other.

[89] We can see here in the notion of an equal right to a say in defining the positive scheme of property a close connection between the Rawls/Kant natural duty of justice account of political obligation and authority and an argument that political authority requires democratic governance.
[90] Simmons (2001), 141.

In short, the double arbitrariness of *de facto* membership in a particular political community, even a just one, prevents the duty that, in a state of nature, requires entering into some civil society with others from grounding particular political obligations to the state in which you actually find yourself.

But is this double arbitrariness problematic in the way Simmons objects? The application of any of my duties to others *qua* persons depends on my particular social circumstances, resulting in specific concretizations of those duties. Some are simple concretizations: My duty of rescue requires, in the circumstances, that I pull the drowning child from the fountain. Though these circumstances will be arbitrary when I simply find myself in them, the duty retains its moral force even when tailored to them. In the political case, the mere fact that I am born inside some state's territory is not, for Kant (and Rawls), what connects me morally to its legal system and so is not what makes me a genuine member with its obligations and privileges. As Kant's account has it, it is that I was born among certain people, people I cannot help but interact with as I exercise my freedom by living my life in this particular community and pursuing my various relationships and projects, and is this fact of interaction—and the moral imperative that those interactions be consistent with the equal right of freedom of everyone—that connects me with them to our common political community.[91]

That I interact with these specific people rather than others is contingent and thereby arbitrary, but it is not a troubling arbitrariness for our purposes: justice may require that I treat people with whom I interact daily differently than those with whom I do not, whether or not I consent to my

[91] This sort of view seems also implicit in Rawls' account with its emphasis on the principles of justice regulating social cooperation among free and equal persons.

interactions with them. And so, if justice demands we enter into political communities with those with whom we live 'unavoidably side by side,' the arbitrariness of the communities that result will not, by itself, imply that what justice demands will not be tailored to the circumstances of membership and so will apply to us *qua* members of these communities.[92]

And so, the moral reasons you have for respecting the right to freedom, both yours and others, are important reasons justifying both a duty to enter into a scheme of law—when you are not in a state already—and a tie of membership to the scheme of law in place—when you are in a state already—even, in the case of a nearly just state, a duty to comply with its laws. Simmons is right to deny the claim that justice requires your *compliance* with the laws of your state, no matter what those laws are.[93] But he is mistaken in thinking that some condition other than that the laws and the legal system be sufficiently just—a consent or other voluntariness condition, say—must be met for someone to have a duty to comply with the law.[94]

But Simmons' denial of a duty to comply when the laws fall far short of justice does not imply that the duty of justice will have no bite when the community and its laws does fall short; indeed, I take Kant's position to imply

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[92] Despite what this might suggest, it is not simply the case that the boundaries of political communities are determined by facts about who interacts with whom, since these facts about who interacts with whom are often themselves determined, at least in part, by those political boundaries already in place. This poses a problem for this sort of account, though not, I think, an insuperable one.

[93] Even assuming the Kantian non-positivistic conception of law whereby a set of coercively enforced social rules counts as law only if it meets some standard of rightness.

[94] Granted, Kant does say that individuals will have a duty to consent to membership in a just civil society. Simmons' objection that "[a]n obligation to enter (by consenting to) some civil society is presumably [not] identical to […] an obligation to do what such obligatory consent would be consent to," however, nevertheless fails. Kant also says, quite clearly, that, should an individual refuse to consent to membership, others may permissibly force her to do what her obligatory consent would be consent to (See 6:312). This suggests that 'consent' in Kant's account is not contractual consent, but rather some broader kind of consent, and so it is not doing the kind of work that Simmons' objection assumes.

that the natural duty of justice will require something of you in a variety of communities and that the kind and strength of those requirements will vary according to the just-ness of the laws in question. For Kant, so long as the set of social rules governing the community counts as law—so long as there is some positive scheme of coercively enforced rules governing how people interact—you are not wholly in a state of nature with your community's fellow members. I think we can see this point emerge by considering the importance of a legal system exemplifying the ideal of the rule of law.

4. The Rule of Law and the Duty of Justice

In order for governance by law to be a solution to the problem of domination in the state of nature, law must, as a working scheme, exemplify the desiderata that constitute the rule of law. Granted, the laws of a state can meet these largely formal conditions of the rule of law while nevertheless being in many ways substantively unjust, since the ruling elite can have reasons other than the pursuit of justice—reasons of efficiency, say—to respect the rule of law.[95] It need not be the case, then, that, by observing the rule of law, the state or ruling elite thereby shows respect for its citizens. Depending on why they respect the rule of law, they might in fact show disrespect for them by respecting it.

To admit this, however, is not thereby to deny that the fact that a legal system observes the rule of law—even an unjust or oppressive legal system—can be, by itself, morally important for its citizens. I argue in this section that the rule of law can itself be of intrinsic value for citizens because,

[95] This claim is H.L.A. Hart's basic point against Lon Fuller in their famous debate about morality and law. See Hart's "Positivism and the Separation of Law and Morals" (1958), Fuller's "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) and Hart's *The Concept of Law* (1961).

insofar as even an unjust legal system observes it, its laws more precisely and predictably set out what citizens may expect from one another and such precision and predictability is important if citizens are to exercise their freedom. And, because it can be of intrinsic value to one's fellow citizens, a person's duty of justice can give her important moral reasons sometimes to act in accordance with the law—reasons independent of the substantive justice or rightness of the law—and so reasons to act in accordance with an unjust law that is part of the legal system of an unjust Rechtstaat.

4.1 The rule of law

In *A Theory of Justice*, Rawls takes a legal system, properly so-called, to be "a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation."[96] And, as Robert George notes in "Practical Reason and the Rule of Law," persons are fit to be governed by law because they are practically intelligent agents: they have "capacities to grasp and act on reasons and to distinguish defeated from undefeated, and conclusive from nonconclusive, reasons for action."[97] Laws purport to address reasons to those subject to them, reasons that those persons can understand and so govern their action in accordance with. A legal system, then, addresses those persons subject to its laws as agents.

The ideal of the rule of law, for Rawls, is made up of those precepts that "would be followed by a legal system that perfectly embodied the idea of a legal system."[98] In *Natural Law and Natural Rights*, John Finnis lists the

[96] Rawls (1999d), 207.
[97] George (1999), 116.
[98] Rawls (1999d), 207.

desiderata that together constitute the ideal of the rule of law.[99] According to Finnis,

> A legal system exemplifies the Rule of Law to the extent… that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.[100]

On Finnis' view, the rule of law is "a virtue of human interaction and community" because, when a legal system is working well in these ways, the law secures "a quality of clarity, certainty, predictability, [and] trustworthiness" in human interaction.[101] And that it secures these things is important because, by doing so, it creates the space for those people subject to the law to form their own identities and pursue their own projects.[102] It is by following the precepts of the rule of law that a legal system as a whole, and not just its laws considered individually, addresses those subject to its laws as agents.

Robert George argues that, when a legal system observes the rule of law, even if its laws are systematically quite unjust, it thereby "manifests a degree of procedural fairness that in itself is desirable in human relations and,

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[99] Lon Fuller proposed a similar list of desiderata, which he called "the internal morality of law." Joseph Raz also offers a very similar list. See Raz (1979), 214-218. My sense is that most philosophers who write about the rule of law agree on the set of desiderata and disagree mainly about its significance or value.
[100] Finnis (1980), 270-1. Exemplifying the rule of law is, as Finnis notes, a matter of degree. Raz makes the same point. See Raz (1979), 222.
[101] Finnis (1980), 272.
[102] Finnis (1980), 272.

in particular, in the relations between ruler and ruled."[103] He approvingly quotes Neil MacCormick: "Where it [the rule of law] is observed, people are confronted by a state that treats them as rational agents due some respect as such."[104] For George, by observing the rule of law, the state expresses respect for them as agents—the minimum respect they are due as persons—and, because it expresses such respect for the ruled by the ruler, observance of the rule of law is intrinsically valuable even for citizens of an unjust state. Now, it seems to me that George is correct that the fact that a legal system observes the rule of law can be intrinsically valuable for citizens, but he is mistaken in thinking that it is valuable as the legal system's (and so the state's) expression of respect for citizens, even minimally, as rational agents. For, as Joseph Raz and H.L.A. Hart rightly caution, a state can observe the rule of law entirely for instrumental reasons and even in service of policies and laws that deny the dignity of its subjects.

In "The Rule of Law and Its Virtue," Joseph Raz agrees with Rawls, Finnis and George that the law must be such that it can provide "effective" guidance to those subject to it; if it cannot, it forfeits its status as law.[105] And, on Raz's view, the possibility of providing guidance is the basic value underlying the different desiderata of the rule of law.[106] As Raz puts it, "observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future," and this the legal system does by observing the rule of law.[107] Rawls, Finnis, George and Raz, then, agree on

[103] George (1999), 114.
[104] George (1999), 114.
[105] Raz (1979), 214, 218.
[106] Raz (1979), 214, 218. "The principles do not stand on their own. They must be constantly interpreted in the light of the basic idea" (Raz (1979). 218.
[107] Raz (1979), 221.

this basic point: observing the rule of law is necessary if a legal system is to count as treating those subject to it as rational agents.

Despite this agreement, Raz disputes the sort of claim that George makes that governance by a legal system that observes the rule of law can be of some intrinsic value to citizens as the realization of a minimal relationship of respect between ruler and ruled. Raz argues that the rule of law is a virtue of a legal system only in the sense that sharpness is a virtue of a knife: that the knife is sharp, and so is a good knife, does not mean that sharpness is a moral virtue of the knife, for a knife can be used for both moral and immoral ends and the sharper the knife, the better it is at accomplishing immoral ends.[108] Raz thinks the same applies to law: exhibiting the virtue of rule of law is what makes law good law—that is, effective as law, just as sharpness makes a knife effective as a knife—but that does not mean that exhibiting the rule of law is a moral virtue of the law, for such law can be used for both just and unjust ends. As he puts it, "[t]he rule of law is an inherent virtue of the law, but not a moral virtue as such."[109] On Raz's view, the law is only instrumentally valuable, for it is a tool communities can use, preferably but not necessarily for good ends. When we use it for good ends, observance of the rule of law does respect the dignity of those subject to it; when we use it for bad or unjust ends, the observance of the rule of law does not.

H.L.A. Hart voices a similar sort of worry about law in *The Concept of Law*. Hart argues that the positive characteristics that explain why a set of social rules is properly called a legal system may also be part of the

[108] Raz (1979), 225-226.
[109] Raz (1979), 226.

explanation of why particular systems are unjust.[110] The transition to a legal system—with its legislature, legal code, courts, police and institutions of punishment—concentrates power into the hands of a few, and, as Hart puts it, the cost of this transition is "the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense."[111] There is not the same sort of risk with a pre-legal set of merely primary social rules, for such rules rely instead on widespread acceptance and enforcement for their existence. And, Hart argues, this risk of oppression that comes with a legal system can be heightened precisely when the law exemplifies the rule of law, for that oppression would likely be more effective. In this sort of case, then, a legal system's commitment to the rule of law can actually express disrespect for citizens.

However, it seems to me, that a legal system exemplifying the rule of law can still be of intrinsic value for citizens subject to it, even if the state only observes it for its own instrumental reasons and not to respect its citizens, even minimally, as rational agents. We can see why by considering Rawls' claim that the law's purpose is to regulate individual conduct and social cooperation and that, when the laws themselves are just—when they codify genuine relations of right—"they establish a basis for legitimate expectations."[112] When they are just, the laws "constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled."[113] It is crucial that this just legal system observes the rule of law because, "if the bases of these claims are unsure, so are the boundaries of

[110] As Waldron puts Hart's claim in "All We Like Sheep," "there is something about the positive definition [of law] which helps us explain why some of the systems which satisfy it are not just." (Waldron (1999a), 171)
[111] Hart (1961), 197.
[112] Rawls (1999d), 207.
[113] Rawls (1999d), 207.

men's liberties."[114] We can see here, I think, a concern for individual freedom very much like the concern that motivates the Kantian natural duty account of political authority and obedience. On this account, for instance, persons must be able to own property because genuine freedom, particularly one's ability to will one's ends, requires that one have the right to rely on the availability of certain material things when pursuing those ends. In other words, genuine freedom requires that one be able to form legitimate expectations of others that those things will be as one has left them. I take Rawls' remarks to be suggesting that we must be able generally to form legitimate expectations with regard to others and their actions if we are to exercise genuine freedom in a world in which we cannot avoid interacting with those others.

To exercise our freedom, then, we must be able to make claims on those others that they fulfill our legitimate expectations. For Rawls, the rule of law is valuable because, to the extent that the application of the law is imprecise or unpredictable, "liberty is restricted by a reasonable fear of its exercise."[115] The point of authority, on the natural duty of justice account, is to settle reasonable disagreements about rights, for citizens cannot exercise their freedom while respecting the equal freedom of others unless such disagreements can be settled. By observing the rule of law, a just legal system promotes citizens' freedom because, by doing so, to the extent that a just legal system observes the rule of law, its laws more precisely and predictably set out what citizens

[114] Rawls (1999d), 207. Raz says a similar thing: "[D]eliberate violation of the rule of law violates human dignity. The violation of the rule of law can take two forms. It may lead to uncertainty or it may lead to frustrated and disappointed expectations… It leads to frustrated expectations when the appearance of stability and certainty which encourages people to rely and plan on the basis of the existing law is shattered by retroactive law-making or by preventing proper law-enforcement, etc.… Quite apart from the concrete harm [frustrated expectations] cause, they also offend dignity in expressing disrespect for people's autonomy. The law in such cases encourages autonomous action only in order to frustrate its purpose" (Raz (1979), 222).
[115] Rawls (1999d), 210.

may legitimately expect of each other. The desiderata of the rule of law make sense together as an ideal because of this connection between precision and predictability on the one hand and freedom on the other. Law is capable of solving this problem of reasonable disagreement and domination only insofar as it observes the rule of law.

As Raz and Hart emphasize, there is no essential connection between a legal system exemplifying the rule of law and it codifying genuine relations of right. A legal system can be systematically unjust while nevertheless exemplifying the rule of law. And so, we cannot simply say that, if the self-described legal system exhibits the rule of law, then the individual has a duty to respect it, to refrain from undermining it, to support it, or even to comply with it.[116] As Waldron argues, even if Hart and Raz are correct about the risks of legal systems (as they certainly are), there is something about the nature of governance by law that explains why some of the systems that satisfy it are thereby desirable. Waldron interprets Kant, rightly I think, as making this sort of claim: governance by a scheme of positive law is desirable when it is employed by the community in its pursuit of justice. And it is desirable precisely because the legal system exemplifies the rule of law and what counts as a law, on the retail level, can be determined by citizens without resort to the sorts of moral judgment subject to the burdens of judgment.[117] Citizens, then,

[116] However, there does seem to be a strong, if contingent, connection between the two: because of the content of the rule-of-law ideal, a legal system's genuine commitment to the rule of law will likely be based on a system-wide commitment to respect citizens, a commitment which cannot be restricted simply to questions of procedural or formal justice. A commitment to the rule of law, then, normally goes together with some sort of commitment to justice overall. Finnis offers a plausible explanation of this connection: "adherence to the Rule of Law… is always liable to reduce the efficiency for evil of an evil government, since it systematically restricts the government's freedom of manoeuvre" (Finnis (1980), 274). Since it restricts them, such governments will almost invariably have good reason to abandon the rule of law where possible (say, when doing so won't threaten the elites), and such abandonment will almost always be possible in many telling instances.

[117] See Waldron (2001b).

can interact in circumstances where, because they are governed by law, the legitimate expectations they form with regard to each other are not subject to reasonable disagreements because they do not require the exercise of moral judgment in order to be known and fulfilled.

Law, then, provides the boundaries that make citizens' freedom importantly certain, and it does so by fulfilling the collective need for legal univocity in the face of differing but reasonable views among citizens. However, the importance of the rule of law for citizens' freedom is not restricted to cases of just legal systems, for both one's certainty of the boundaries of one's positive rights and liberties and one's ability to form reliable expectations can be valuable for a person even when these boundaries and expectations are not, from the perspective of justice, legitimate.

4.2 The duty of justice in an unjust Rechtstaat

It would be a mistake, then, to conclude that the duty of justice has moral bite only for citizens of nearly just states. Rawls' claims about this duty, of course, concern citizens of nearly just states: their natural duty of justice gives them a duty to uphold the law. But these claims are not, in the end, about the duty of justice itself but rather about what that duty requires of people who find themselves in a nearly just state.[118] And Kant's account concerns what the duty requires of individuals who find themselves in a state of nature. But Kant's account, as I have argued, does make clear that equal freedom is the underlying value at stake in the natural duty of justice account. As I suggested above, the same things that make the rule of law valuable in a

[118] And so, though the two-part formulation of the natural duty of justice is a central feature of the duty itself, Rawls' formulation of the first part as a duty to comply with the law is specific to the circumstances of citizenship in a nearly just state.

nearly just state can be present in some form even in an unjust Rechtstaat—that is, an unjust state whose legal system nevertheless exemplifies the rule of law—and so a citizen of such a state can have reasons of justice to act in accordance with the law. In this way, the natural duty of justice, understood very generally as a duty to respect others' equal right to freedom, will have some moral bite even for citizens of an unjust Rechtstaat.

Of course, the law itself of such a state will not deserve respect as the law of that community—and citizens will not have a duty to uphold it—for that law fails to respect the human dignity of its citizens. However, to say the law itself cannot deserve respect is not to say that the existence of such a legal system does not give the citizens of such a state any moral ties with each other *qua* citizens. Their shared status as *de facto* citizens of the same state can give them such a tie because of their natural duty of justice: Despite the unjust character of the state, their fellow citizens' right to freedom can sometimes give them reasons of justice to conform their actions to the legal directives in force.

In this state, the government enforces an unjust scheme of law: people are wrongly and unreasonably deprived of certain kinds of property and/or of the exercise of certain valuable rights. Consider the following situation:

> An oligarchic state enforces a redistributive scheme whereby members of a certain religious minority are taxed so that none may rise above a middle-class level of income and the proceeds are distributed as an entitlement to working-class members of the religious majority so that may improve their economic prospects. The sums given to working-class members of the majority religion are relatively sizeable: with sufficient planning and saving, individuals are able to make the sorts of investments in education or business-creation that, if successful, can often lead to comfortable lives for them and their families. The majority of citizens of either religion lack any real political power, so this policy is not something that everyday citizens

> have even the opportunity to try to change. But this scheme is implemented by the legal bureaucracy in a way that exemplifies the rule of law: laws are clear, precise and duly promulgated, they are applied consistently by honest bureaucrats and functionaries, etc.

This scheme is undoubtedly deeply unjust. Suppose you are a mid-level bureaucrat who recognizes this injustice and who has the power to interfere with its implementation, even in a piecemeal way, however you wanted. The question here is: Does the observance of the rule of law matter morally here at all? Specifically, does the fact that the administration of the scheme observes the rule of law and the fact that your interference will violate it give you moral reasons, however weak or overridden, not to interfere in the operations of the scheme?

This question might seem ridiculous. But consider an example of a working-class member of the religious majority who benefits from this scheme:

> Cyrus is not desperately poor: he has a steady, if intellectually stultifying and low-paying job that enables him to support himself and his two children. However, he is unable to save more of his earnings than what is prudent for a 'rainy day.' He does, however, receive these entitlement payments. When he thinks about it, he admits that it is unjust that only adherents of his religion receive them—that he receives them makes him quite uneasy—but he, like almost everyone else, is politically powerless. He accepts these payments, then, in part because this is how things work. But he also accepts them because he has a dream of owning and operating his own small bakery, and the payments will provide him the start-up capital that he otherwise would be unable to acquire.

Were you to interfere with Cyrus' receipt of these payments in your personal efforts at combating this unjust scheme, you would be frustrating the plans he formed while living under this legal system. Does it matter that you would be frustrating his plans? The problem in this sort of case is that all the citizens of

this state are forced by that state's coercive power to conform their actions and interactions—this is, to conform how they live out their lives, what projects they pursue, what commitments they make—to an unjust scheme of law. And this includes citizens such as Cyrus who, even though they benefit from these unjust laws, do want to live decently and morally. Granted, Cyrus' expectations that rely on the payments are not, from the perspective of justice, legitimate expectations: he does not have a genuine claim to the payments. You might think, then, that, since stopping these payments will not otherwise harm him or his family but only frustrate his plans—one formed on the basis of illegitimate expectations—that the fact that his plan will be frustrated does not itself give you moral reason not to interfere with the distribution of these payments.

But this, I think, is too simple. Since this otherwise very unjust state observes the rule of law, its citizens will enjoy certain (objectionably bounded) spheres of freedom, an enjoyment made possible in part because those spheres are precisely defined by the legal rights, privileges and duties predictably enforced by the legal system. Cyrus' sphere is wider because of the workings of this deeply unjust redistributive scheme; those adherents of the minority religion, their spheres are narrower because of it. However, if *any* of these citizens are to make choices and to set ends for themselves—if they are to exercise some authorship over their own lives—they will likely have good reason to value the spheres of freedom that they do enjoy: since those spheres are defined and enforced, they are able to form stable expectations with regard to their property and the behavior of others and to rely on them in their planning. And having this ability, even if wrongly circumscribed by an unjust law, is rightly important for them as rational agents living out organized lives.

It seems to me that, for those individuals such as Cyrus who simply find themselves living in such a state and who are trying as best they can to live decently, the expectations they form in order to exercise their freedom in the ways that the legal system in place allows for them, though they are certainly not *legitimate* expectations, may nevertheless merit some respect from fellow citizens: you have some reason to respect the laws when doing so contributes to the fulfillment of other citizens' expectations, expectations that, though not legitimate, are *reasonable* under the circumstances.[119] And they merit respect because those expectations are connected to the person's freedom in a way that fellow citizens ought to recognize if they are to respect that person's equal right to freedom.

The basic thought is that, even though the person's expectations are not fully legitimate and so she does not really have a right to have them fulfilled—Cyrus does not have a *right* to the payments—considerations of justice give you important moral reasons to respect that person's freedom by not thwarting the fulfillment of her expectations, except when there are countervailing considerations based on your (or another's) interest in freedom that override those reasons. And these important moral reasons, I argue, constitute a political tie for two reasons: you have them towards those you cannot help but interact with, and the expectations you have reason to respect depend on the particular legal system—the actual positive rights, privilege and duties it codifies and enforces—that claims both you and them. It is not clear to me how much influence such reasons will have in many real-world cases. But I suspect that, at least in some, they are not idle.

[119] These expectations are reasonable and so worthy of some respect because they are the expectations of fellow citizens who are minimally, if at all, responsible for the government and the laws.

5. Conclusion

Why do we need authoritative law? Because we, as free persons deliberating responsibly about rights and justice, will inevitably and reasonably disagree about justice and the boundaries of our rights. When two persons in a state of nature arrive at conflicting, though reasonable, judgments about a question of right, they face an impasse: neither has a duty to accept the other's judgment and each must, because of the duty of rightful honor, resist being forced to accept the other's judgment and instead try to act on her own. In this sort of situation, each person will reasonably regard herself as having good reason to use force in defense of what she takes to be her rights. And so, what ends up counting as right in the state of nature will be the judgment of the strongest because they are the strongest. Without authoritative law, then, this sort of state of nature—one in which conscientious and morally aware persons try to act rightly—ends up being a situation of domination by the strong. And this sort of situation is incompatible with a system of equal freedom.

This account does not deny that there are correct answers to questions of rights and justice. The problem is that the human deliberative faculty faces the burdens of judgment when addressing these questions, and so different persons can arrive at conflicting answers to them even though all have fully fulfilled their deliberative responsibilities. It may very well be, then, that a person can arrive at the correct answers regarding some question of right. For instance, he can judge correctly what it takes to respect everyone's property rights. But, if he claims the standing to determine himself the rights and duties entailed by his property rights—including those duties possessed by others—he must, in doing so, deny that those others have the standing to

determine those duties themselves. In this way, while he may be able to respect everyone's property rights—and so their equal freedom when it comes to property—insofar as he deliberates correctly, he cannot respect others' equal right, in circumstances of reasonable disagreement, to have a say in the positive scheme of property rights that will govern their interactions with him, for he claims an exclusive right.

V. DISAGREEMENT AND DEMOCRATIC INSTITUTIONS

As I have argued, the distinctive problem requiring authoritative law for its solution is the problem of reasonable disagreement among citizens about rights and justice. Reasonable disagreement is a problem because, if left unresolved in a state of nature in which persons exercise their freedom while trying to respect the equal freedom of others, it will lead unavoidably to domination by the strong. And so a community of free and equal persons is impossible to realize in a state of nature; it requires governance by authoritative law for its realization. Simmons is mistaken in holding that interactions among free persons need not be governed by law so long as they each act rightly towards each other. Because of the burdens of judgment—and the reasonable disagreements about rights and justice that are their inevitable result—persons will be unable to achieve stable relations with each other as free and equal persons, no matter the extent to which each attempts conscientiously and in good faith to act rightly.

However, to say that authoritative law is necessary for a community of free and equal citizens is not yet to establish that citizens of any existing state have a duty to uphold that state's actual laws. More must be said, for, though a scheme of authoritative law is necessary, it may very well be that the actual scheme in place fails to satisfy whatever other conditions are required for the laws to be worthy of being upheld as law for a community of free and equal citizens. Of particular concern here will be those conditions pertaining both to the content of the laws and to the institutions and procedures used to decide upon the laws. That the scheme of law must satisfy these other (as yet unspecified) conditions is quite important, for, as H.L.A. Hart warns, governance by a scheme of positive law may simply institutionalize

domination by the strong, making such domination more efficient.[1] We need to understand, then, what other conditions a scheme of law must satisfy if it is to be a solution to the problem of reasonable disagreement about rights and justice among free persons.

Here, then, is the situation: Even morally committed and knowledgeable persons require authoritative law to govern their interactions because they disagree, sometimes reasonably, about rights and justice. But, of course, when they try to specify the content of these laws, their disagreements about rights and justice immediately become disagreements about what their particular laws should be. An account of how a community is to decide upon its particular laws must confront the question of how to resolve this sort of disagreement in a way consistent with the equal freedom of all citizens. Not only must the particular laws themselves, as part of the overall scheme, codify relations of right among free and equal persons, but the procedures used to select laws must also respect each citizen as free and equal.

I argue here that respect for citizens as free and equal requires that the procedures—and so the institutions that carry them out—be democratic ones. An account of democratic governance must be concerned, of course, with how disagreement among citizens about questions of justice is to be overcome.[2] But, as I will argue, democratic procedures provide an authoritative solution to disagreements among citizens about justice only when those disagreements are *reasonable* ones. Even a fully democratic pedigree cannot give a political

[1] Hart makes this point in his debate with Lon Fuller. See Hart's *The Concept of Law* (1961), 197.
[2] For other recent accounts that understand disagreement as a major part of the problem democratic governance is to solve, see Jeremy Waldron's *Law and Disagreement* (1999), Amy Gutmann and Dennis Thompson's *Democracy and Disagreement* (1996), Joshua Cohen's "Deliberation and Democratic Legitimacy" (2002) and "Procedure and Substance in Deliberative Democracy" (2003), and Thomas Chritiano's *The Constitution of Equality* (2008).

choice that is unreasonable from the perspective of justice the status of legitimate law. In this way, a citizen who disagrees with some law only has a duty to uphold it as law if it is reasonable from the perspective of justice. The proper democratic response to reasonable disagreement differs from the democratic response to unreasonable disagreement.

1. Constitutionalists and Proceduralists

This chapter develops this democratic solution to the problem of reasonable disagreement about rights and justice by considering the important dispute in democratic theory between constitutionalists and proceduralists. This dispute concerns whether a majority's decisions count as legitimate (or, authoritative) democratic decisions (1) so long as they violate neither those rights internal to the democratic process nor those rights required for the process to function fairly—as a proceduralist claims—or (2) only if those decisions also satisfy additional (content-based) constraints on legitimacy—as a constitutionalist claims.[3] The right to vote, for instance, is a right internal to the democratic process; the right to free speech, at least for certain kinds of speech, is a right required for the process to function fairly. The right to free exercise of religion seems to be neither kind of right.

Suppose, then, that a citizen confronts a law, passed by democratic institutions, that she reasonably thinks unjustly limits the religious freedom of some citizens. Both the proceduralist and the constitutionalist will admit that whether this law is unjust—whether it does violate these citizens' right to free

[3] Robert Dahl introduces this way of dividing up rights into those (1) internal to the democratic process; (2) external to the process but necessary for its fair functioning; and (3) external to the process and unnecessary for its fair functioning. See Dahl's *Democracy and Its Critics* (1989), 169-173. For other discussions, see Gutmann and Thompson (1996), 33; Cohen (2003), 19-20; Corey Brettschneider's *Democratic Rights* (2007), 11-23; and David Estlund's Introduction in *Democracy* (2002).

exercise of religion—is itself an important question.[4] Their dispute concerns whether this injustice affects the law's legitimacy: Should this citizen think (1) that this decision is legitimate (or, worthy of being upheld as law), if unjust—as a proceduralist would have it—or (2) that it is illegitimate because unjust—as a constitutionalist would have it? For the proceduralist, the law's democratic (or, majoritarian) pedigree gives the citizen important moral reasons to abide by the law, even if they are outweighed by the law's injustice. For the constitutionalist, because the law fails to meet certain important standards of justice, this law's procedurally democratic pedigree does not by itself give the citizen important moral reasons to abide by the law.

Basically, this debate concerns whether a bill of rights that enshrines the standard set of liberal rights—including, for instance, the right to free exercise of religion, the right to speak freely, the right to privacy—is itself a component of democratic governance or whether it is, at best, an external limitation on democracy that is required by justice.[5] For the constitutionalist, a bill of rights is a requirement not simply of justice but of democracy; for the proceduralist, it is not.

I argue here for a kind of constitutionalism: there are additional, non-procedural (or, substantive) constraints on legitimacy that an account of democratic legislation must include. But my version of constitutionalism is distinguished by the claim that the non-procedural constraints on legitimacy

[4] Now, a proceduralist might base her view on the skeptical claim that, in politics, there are no correct answers about what justice requires: because there are no correct answers, we must resort to a majoritarian procedure. But, as Gutmann and Thompson point out, this sort of skepticism ultimately undermines the moral argument for resorting to a majoritarian procedure. As they argue, the strongest versions of proceduralism admit that the question of whether the law is just is itself an important question. See Gutmann and Thompson (1996), 28.

[5] See Jeremy Waldron's discussion of the question of judicial review in the last third of Waldron (1999b).

are justified because laws that do not satisfy those constraints count as *unreasonable* from the perspective of justice for a community of free and equal citizens. The point of the substantive constraints—those constraints, for instance, enshrined in a bill of rights—is to prevent the democratic procedures from counting unreasonable outcomes as legitimate. And, I argue, this is the only role for such substantive constraints in a theory of democratic law: once the political disagreements about justice and rights are reasonable ones, any substantive constraints on the legitimacy of procedurally democratic outcomes privileges one reasonable view (or family of views) as the right one. And, were the constraints to privilege one reasonable view over others, it would amount to a failure to respect those citizens who reasonably disagree as free and equal participants in governing.

1.1 Waldron's argument for proceduralism

In *Law and Disagreement*, Jeremy Waldron defends a version of proceduralism about democracy.[6] He argues that, barring special justification, majority-vote is the correct procedure for resolving political disagreements, even disagreements about rights and justice, because it is a particularly *respectful* procedure in circumstances of disagreement.[7] Majority-vote respects each person's judgment properly and, by doing so, shows proper respect for

[6] For other proceduralist accounts of democracy, see Peter Singer's *Democracy and Disobedience* (1973), especially 30-41; Robert Dahl's *Democracy and Its Critics* (1989); and John Hart Ely's *Democracy and Distrust* (1980).

[7] Waldron calls these circumstances of disagreement 'the circumstances of politics.' These circumstances consist in "the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be." And these circumstances "come as a pair": "disagreement would not matter if there did not need to be a concerted course of action; and the need for a common course of action would not give rise to politics… if there was not at least the potential for disagreement" (Waldron (1999b), 102).

her as a person.[8] It does so in two ways: (1) it take seriously the reality of citizens' disagreements by allowing each citizen to register her view by voting, and (2) it treats all as equals in the authorization of law by giving each a vote with a weight equal to the vote of every other citizen.[9] Waldron's defense of majoritarianism is important, I think, because it takes seriously both the democratic ideal of self-government and the reality of persistent disagreement among citizens about justice and rights.[10]

And, Waldron's argument begins by noticing that the very reasons we have for holding that persons have rights also justify holding that they merit having a say in resolving disagreements about rights and justice via the law. And so, it is because persons are rights-bearers, Waldron argues, that self-government requires that not only questions of policy but also basic questions of justice and rights be settled, ultimately, by the people themselves. As Waldron observes, in attributing rights to a person, one is treating her, in part, "as essentially a thinking agent, endowed with an ability to deliberate morally, to see things from others' points of view, and to transcend a preoccupation with [her] own particular or sectional interests."[11] In this way, particular kind of faith in the person and her agency lies behind attributing to her the basic liberal rights.[12] And, a tension emerges, Waldron argues, when

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[8] To be precise, Waldron does not argue that equal respect for persons requires majority decision in any and all cases of collective decision-making. He argue that equal respect requires majority decision in the circumstances of politics. See Waldron (1999b), 114-116.
[9] Waldron (1999b), 111. Waldron notes that Hobbes' view, in contrast, respects persons in sense (1) by taking seriously the reality of disagreement and the problem it poses for persons, but it does not respect persons in sense (2). See Waldron (1999b), 114.
[10] As Thomas Christiano puts it in his "Waldron on Law and Disagreement," "On [Waldron's] account, a conception of legitimate authority must give pride of place to respect for the judgments of citizens at the same times as accommodate the reality of pervasive disagreement in politics" (Christiano (2000), 515-516).
[11] Waldron (1999b), 250.
[12] Waldron (1999b), 250. As Waldron points out, the sort of agency that the attribution of rights presupposes that the rights-bearer possesses is quite similar to the sort of agency that

we also claim that disagreements about these liberal rights must be excluded from the jurisdiction of democratic decision and instead protected by, say, a constitution's bill of rights, for excluding such disagreements seems inconsistent with the faith in them that is presupposed by the attribution of rights.

In this way, respecting the citizen as a bearer of rights requires respecting his judgment about the content of those rights:

> When we argue about someone's rights, the subject of the conversation is likely to have a considered view of the matter. And since the point of any argument about rights has to do with the respect that is owed to this person as an active, thinking being, we are hardly in a position to say that our conversation takes *his* rights seriously if at the same time we ignore or slight anything *he* has to say about the matter.[13]

Even when it comes to disputes about justice and rights, each citizen has reason to insist that she have an equal say in resolving them. Each citizen possesses, then, a right to participation, a right that is, on Waldron's view, "the right of rights."[14] Disputes about rights and justice, then, ought to be resolved via democratic processes rather than settled beforehand in a constitutional convention and enshrined in a bill of rights with judicial review.[15]

Of course, many will find this consequence worrisome, for it allows that the liberal rights—including the crucially important ones, such as freedom of speech or religion—are 'up for grabs' in a democracy. Waldron,

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Rawls' attribution of "a sense of justice" presupposes that citizens possess. For this notion of a sense of justice, see Rawls' *A Theory of Justice* (1999d), 505-510.

[13] Waldron (1999b), 251.

[14] Waldron borrows this phrase from William Cobbett. See Waldron's explanation of the right to participation in Waldron (1999b), 232-239.

[15] As Waldron puts it, there is "something unpleasantly inappropriate and disrespectful about the view that questions about rights are too hard or too important to be left to the rights-bearers themselves to determine, on a basis of equality" (Waldron (1999b), 252).

however, asserts just that: in a democracy, "everything is up for grabs which is the subject of good-faith disagreement."[16] And everything is up for grabs because proper respect for citizens as moral agents with their own senses of justice requires respect for their judgments about rights and justice, and to respect their judgments in the circumstances of disagreement is to give each an equal say.[17]

1.2 A constitutionalist response

Waldron's view argues for the citizen's right to an equal say in the process of debate and decision on the basis of the fact of pervasive disagreement about rights and justice and a moral principle of respect for judgment. In "Waldron on Law and Disagreement," Thomas Christiano has objected that any such argument for democratic governance runs into trouble. As he points out, "we ought to expect disagreement about the legitimacy of the collective decision procedures themselves in addition to the disagreement that animates the call for those procedures."[18] Disagreement about procedures will itself be pervasive among citizens. And so, when even some citizens disagree in good faith with a proposed procedure for resolving substantive disagreements about rights and justice, proper respect for judgment—the basis for Waldron's argument for democracy—will require that citizens resort to some procedure to resolve this disagreement about procedures. But some citizens will likely disagree about what procedure to use to resolve this

[16] Waldron (1999b), 303.
[17] It should be emphasized that things are 'up for grabs' only when they are subject to *good-faith disagreement*, for it is only when someone is deliberating in good faith about some question that their judgment merits respect in circumstances of disagreement. This good-faith constraint goes some way towards weakening the claim that everything is up for grabs. But the constraint does not narrow the scope of the claim, and, as I will argue, Waldron's mistake is to make the scope of this claim too broad.
[18] Christiano (2000), 520.

procedural disagreement. Now, were they to resolve this procedural disagreement by *imposing* a procedure, they would show those who disagree the sort of disrespect that imposing a decision on the substantive question would show.[19] Respect for judgment requires retreating to a procedural solution to resolve this procedural disagreement.[20] In this way, Waldron's view leads either to an infinite regress of procedures or is self-defeating.

Christiano notes that one solution is to ground the principle of respect for judgment in a more basic principle, for then one can justify both the principle and the restrictions on its scope such that only certain disagreements must be resolved by democratic procedure. As he puts it, "Such a principle should support the idea that disagreements on a number of issues ought to be resolved as a matter of fairness by democratic means but limits the extent of disagreements that must be handled democratically. The basic principle itself should be non-negotiable."[21] One view that does this, defended by Rawls and deliberative democrats but rejected by Christiano, grounds the principle for respect for judgment in a more basic principle of reciprocity.[22] As Christiano has it, the idea behind the Rawlsian principle of reciprocity is that "I respect your judgment if you respect mine and vice versa."[23] If this is indeed the basic idea, then it seems that all reciprocity seemes to require here is that I be willing to uphold the law should you win the vote so long as you are willing

[19] Christiano (2000), 522.
[20] On David Estlund's explanation of proceduralisr accounts, the characteristic move of such accounts is a 'retreat to procedure' when confronted with disagreement concerning some question of justice. See Estlund (2008), 70-72.
[21] Christiano (2000), 540.
[22] Christiano (2008), 286. The other option, which is the one Christiano favors, is to ground the principle of respect for judgment in the more basic "principle of equal consideration of interests." I do not discuss this alternate view because, as an account that takes individual well-being and not freedom as the grounding value, it is not a liberalism of freedom and so is beyond the scope of this work.
[23] Christiano (2008), 287. See also Christiano (2000), 539.

to do the same if I win. I need only respect your judgment in this way if you are prepared to respect mine and vice versa.[24] This sort of reciprocity seems to me to be too shallow. The proper sort of reciprocity, as I will argue here, requires more than this: it must be a reciprocity of respect for persons of which respect for judgment is only one part.[25]

Consider the following example of a disagreement about justice settled by a democratic vote, taken from Amy Gutmann and Dennis Thompson's *Democracy and Disagreement*:

> Imagine a new director of Arizona's health system who is faced with the rapidly increasing costs of organ transplants [for the poor] in the state's health care budget. […] Suppose further that the director calls on five citizens, chosen at random from the state's jury lists, to decide whether or not to impose a [small] tax surcharge, which most citizens will have to pay, in order to continue providing organ transplants to terminally ill citizens […] After selecting the jurors, the director simply asks them to vote, yes or no, on whether to continue funding organ transplants [for the poor].[26]

Now, Waldron's view would seem to say the health director selected a justified procedure for deciding this policy question, and the results of the vote will be binding on the community on account of their democratic (because majoritarian) pedigree.[27] Let us suppose that the vote is 3-2 against continued funding. This decision not to fund transplants for poor

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[24] This is especially clear in "Waldron on Law and Disagreement" where Christiano calls this more basic principle of reciprocity the principle of "reciprocal equal respect for judgment" (Christiano (2000), 539 fn19).

[25] This other sort of reciprocity is, contra Christiano, the sort of reciprocity Rawls is concerned with. See, for instance, his *Political Liberalism* (1996), xliv; and his *Law of Peoples* (1999b), 14. Certain deliberative democrats also make use of reciprocity in this sense. See for instance, Guttman and Thompson's *Why Deliberative Democracy?* (2004), 141-142; and Joshua Cohen's "Democracy and Liberty" (1998), 194, 197.

[26] Gutmann and Thompson (1996), 29.

[27] This is not quite right, since Waldron does emphasize the role that deliberation should play. You may assume, for the sake of argument, that the citizens on the jury did engage in the right sorts of deliberation. However, that they actually do not in Gutmann and Thompson's example does not matter for the discussion here, since there is nothing about deliberation that would prevent the jury members from voting the way that they do.

citizens—correct or not from the perspective of justice—will be, on this view, law worthy of being upheld by Arizonans because doing so is required to respect the judgment of those in the majority.

But let us flesh out this example with some (plausible) detail. Suppose that the three voted against funding because they recognized that, as healthy and prosperous adults with good employer-provided health insurance, they will not need state help should they need organ transplants but will have to pay the surcharge. Or, alternatively, suppose that the three voted against funding because their faith teaches that, because transplanting organs violates the sanctity of the body, organ transplants are forbidden and they do not want tax dollars to be used to facilitate such violations.[28] Neither justification seems an appropriate basis for a political choice binding on all citizens for neither is compatible with proper respect for one's fellow citizens, particular those fellows who are poor.

As Gutmann and Thompson argue, those in the majority cannot simply say, "We represent the popular will, and therefore our decision is legitimate, whatever its basis."[29] And this is true even if the three were willing to abide by the results had the vote gone the other way, for the sort of reciprocity at issue here requires more than reciprocal respect for each other's judgment. It requires reciprocal respect for each other's interests as free persons, and this sort of respect places substantive constraints on legitimate political justifications and so on legitimate political choices. Or, as Gutmann and

[28] Granted, these justifications are overly simplistic. Many times citizens have several justifications, both partial and full, for their vote on some important question of justice. Because of the point I intend to make with the example, that the justifications are simplistic is not a problem so long as they are plausible as possible justifications, as I think they are. I thank Hans Oberdiek for discussion on this point.
[29] Gutmann and Thompson (1996).

Thompson put it, "decisions violating the basic liberty or opportunity of any person cannot be justified simply because they result from majority rule or, for that matter, any other generally acceptable voting procedure."[30] The majority cannot claim that respect for them requires that their fellow citizens uphold their decision as law out of respect for their judgment, for their decision (and so their judgment) fails—because of its content and the justifications for it—to respect their fellows as free and equal persons.[31] And so Arizonans, in either instance, would fail to have a duty to uphold such a decision as law.

Waldron is correct that upholding the results of a majoritarian procedure can be an important way for a citizen to respect her fellows as free and equal in circumstances of disagreement about rights and justice. But this citizen does not *owe* her fellows such respect for their judgment when it is only this sort of thin, procedural respect that is shown in the political processes. Her fellows' political judgments are only owed this sort of respect by her when their judgments are compatible with the conviction that all citizens, as free and equal, possess certain basic rights, for then they show proper respect for their fellows as persons. And this is true even if the majority would have been willing to uphold the law had they lost the vote: the principle of reciprocity requires respect for judgment only as a part of respect for persons, and so proper respect for the majority requires upholding their decision as law only if, in the content and bases of their judgment, they have shown proper respect for their fellows.[32] When the majority's decision fails in this regard, a

[30] Gutmann and Thompson (1996).
[31] Charles Beitz makes a similar point about Bruce Ackerman's account in his *Political Equality* (1989), 64.
[32] Waldron briefly considers this sort of understanding of reciprocal equal respect for persons in *Law and Disagreement*, and he rejects it as unavailable in the circumstances of politics: "[W]e can see that this broad notion of respect is unusable in society's name in the circumstances of politics. It is because we disagree about what counts as a substantively respectful outcome that we need a decision-procedure; in this context, folding substance back into procedure will

citizen who upholds it out of a mistaken respect for that majority's judgment would actually be failing to show proper respect for herself and her fellows as free and equal persons, for she would be acting as if legitimate law need not establish a system of equal freedom for *all*.[33] And so, that a law has the right procedural pedigree is not enough to make it worthy of being upheld as law.

However, even granting that majoritarian judgments must be compatible with the conviction that all citizens possess the basic liberal rights, there remains something importantly right about Waldron's insistence that everything is up for grabs in a democracy. A self-governing community, as Waldron emphasizes, is one whose citizens together pursue a just community of law in circumstances of disagreement, and to exclude parts of the community's legal structure from the purview of democratic (or, majoritarian) decision-making is, to that extent, to deny the community the opportunity to be self-governing. While it is not up for grabs whether the basic liberal rights may be abrogated by a majoritarian procedure—a decision that does so is not worthy of being upheld—the reigning *interpretations* of those rights—the particular conceptions of them (and so of what it takes to guarantee them) embedded in the community's laws—*are*, I argue, up for grabs. That the liberal rights must be guaranteed is excluded from the purview of democratic decision-making but what it takes to guarantee them is not: a self-governing community is one whose citizens together decide, in circumstances of disagreement, what guaranteeing these rights actually requires.

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necessarily privilege one controversial view about what respect entails and accordingly fail to respect the others" (Waldron (1999b), 115). Waldron's mistake here, as my argument in this chapter will make clear, is to think that what is crucial here are facts about which views are controversial and which are not. Some claims can be controversial because some disagree with them for the wrong (because fundamentally illiberal) reasons.

[33] Here we see again Kant's notion of rightful honor as a duty to oneself.

2. JUDGMENT AND LIBERAL CONCEPTIONS OF JUSTICE

A judgment that a liberal right need not be guaranteed is not worthy of respect because, from the perspective of justice, it is an *unreasonable* judgment. Two conflicting judgments about what guaranteeing a right requires may each be worthy of respect because each, from the perspective of justice, may be a *reasonable* judgment. The underlying idea here is Rawls' notion of the burdens of judgment that all citizens encounter adopting the perspective of justice and in making their political choices from that perspective.[34] The burdens of judgment are, as Rawls explain, "the many obstacles to the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life."[35] These burdens alone explain the inevitability of a certain kind of disagreement about rights and justice, namely those disagreements among persons who are themselves motivated by the correct concerns and who judge conscientiously and in good faith on the same evidence. Even when their judgments are not shaped by bias or irrationality, these obstacles—the complexity of the evidence, the need to weigh a variety of considerations, the need to engage in interpretation—are sufficient to cause disagreements about rights and justice.[36] When the sources of a disagreement lie in the burdens of judgment the deliberators face rather than in the

[34] For Rawls' main discussion of the burdens of judgment, see Rawls (1996), 54-58.
[35] Rawls (2001), 35.
[36] For related discussion, see Charles Larmore's treatment of moral judgment in his *Patterns of Moral Complexity* (1987), 1-21, and his discussions of pluralism and disagreement in *The Morals of Modernity* (1996), 152-174. In "Reply to Habermas," Rawls seems to say (but does not explicitly say) that the recognition of the burdens of judgment has consequences only for one's attitude towards other people's comprehensive doctrines (Rawls (1996), 375). Joshua Cohen's discussion of reasonable pluralism in "Democracy and Liberty" suggests this same thing about the burdens of judgment. See Cohen (1998), 187-193. As Waldron argues, there seems good reason to take the burdens of judgment to have similar consequences for people's judgments about rights and justice, and that our attitudes towards such judgments ought, in some appropriate way, to reflect that. See Waldron (1999b), 153. As my discussion here will make clear, I interpret Rawls in "The Idea of Public Reason Revisited" (1999a) and *Justice as Fairness* (2001) to be in agreement with Waldron on this point.

deliberators' bias or irrationality, that disagreement counts as a *reasonable* disagreement, for the deliberators have done all we may expect of them as human deliberators.[37]

When a disagreement about rights and justice is best explained by the fact that citizens face the burdens of judgment—when it is a reasonable disagreement—the conflicting judgments all merit respect and so the disagreement must be resolved by democratic (or, majoritarian) procedures. When one side to a disagreement fails to be motivated by the correct concerns or to judge in good faith, their judgment and so their side of the disagreement is unreasonable.[38] And so, this account offers a different explanation than Gutmann and Thompson as to why the decision to deny funding for organ transplants is not worthy of being upheld as law by citizens: the majority's decision is not compatible with *a reasonable conception* of the basic liberty and opportunity of persons because it is not motivated by the correct concern for rights and justice.[39]

What is it for a political judgment to be motivated by the correct concerns and so to count as reasonable from the perspective of justice? Let us begin with Rawls' notion of a reasonable political conception of justice, which, he says, is a conception that endorses "the underlying ideas of citizens as free

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[37] Waldron seems to think that the fact that persons face the burdens of judgment is not simply sufficient to cause disagreement among citizens about rights and justice but is the "normal explanation" for such disagreements and so, "if we ascribe someone's political difference with us to the influence of self interest, that must be justified as a *special* explanation" (Waldron (1999b), 304). Waldron's claim here seems to me too strong.

[38] In this discussion, I am considering a simplified case of disagreement in which the conflicting views are both reasonable. Many disagreements, of course, will be between reasonable and unreasonable views, though these sorts of cases add complexity that is unhelpful for my purposes here. The account I present, though, can be extended to treat these sorts of cases in a satisfactory way.

[39] The difference here with Gutmann and Thompson's view is that putting it this other way explicitly leaves open to democratic deliberation the definition of basic liberty and opportunity, so long as the democratic processes of definition settle on a reasonable definition. It need not get the correct definition from the perspective of justice, only a reasonable one.

and equal persons and of society as a fair system of cooperation over time."[40] There will be, Rawls says, a "family" of such conceptions, since these underlying ideas are, because of the burdens of judgment, subject to a variety of plausible interpretations when developed into a full conception of justice and law.[41] But three features are necessary for a conception to fall within the family of reasonable conceptions:

> First, a list of certain basic rights, liberties and opportunities (such as those familiar from constitutional regimes);
>
> Second, an assignment of special priority to those rights, liberties, and opportunities, especially with respect to the claims of the general good and perfectionist values; and
>
> Third, measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms.[42]

If a conception does not possess these three features, it does not actually endorse the underlying ideas and so is not a reasonable conception of justice. To put it another way, such a conception is not a reasonable conception of justice because it cannot plausibly claim to aim for a community of free and equal persons. And so, a reasonable political conception of justice, then, must endorse this liberal core.[43] A reasonable political judgment is one that is compatible with a reasonable conception of justice; an unreasonable judgment is one that is not. One way of understanding the significance of this distinction between the politically reasonable and unreasonable is to say that a

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[40] Rawls (1999b), 141.
[41] Rawls (1999b), 136-137.
[42] Rawls (1999b), 141.
[43] This conception of 'reasonableness' is different than that offered, for example, by Charles Larmore in his "Political Liberalism." Larmore eschews any content-based criteria for reasonableness, instead confining it to "thinking and conversing in good faith and applying, as best one can, the general capacities of reason which belong to every domain of inquiry" (Larmore (1998), 56). The result, on Larmore's view, seems to be that the content of the principles of justice governing a community as law is determined by what is uncontroversial among reasonable citizens: "we must look to a core morality that is, as much as possible, common ground" (Larmore (1998), 62).

group of people is not a genuine political *community* unless the laws governing them are justifiable according to some reasonable political conception of justice. For it is only when their laws are justifiable that it is plausible to claim that they are together pursuing the project of justice and so plausible to appeal to a principle of reciprocity of respect.

Of course, members of a genuine political community, because they face the burdens of judgment, will still reasonably disagree about how to interpret those basic liberal rights. And these disagreements about rights are what must be resolved by democratic procedures, and, when they are, all citizens ought to uphold the results as the law out of respect for the (reasonable) judgment of those in the majority. Now, those in the majority can claim that their decision ought to be upheld as law only because they themselves have shown proper respect for their fellow citizens—those who must uphold their decision as law—as free and equal by making a decision that is justifiable according to a reasonable conception of justice and so that can plausibly claim to aim for a community of free and equal persons. Their fellows may reasonably disagree with the decision—they may reasonably find it defective when they deliberate from the perspective of justice—but this is the sort of disagreement democratic processes are meant to resolve. To this extent, then, justice and liberal rights are properly up for grabs in a democracy.

When a democratic law seems 'too unjust' to be worthy of being upheld, then, it is the *kind* of injustice in question doing the work and not the amount of injustice: citizens do not have a duty to abide by the results of democratic procedures that competes with (and is outweighed by) their duty to promote justice because this result is *unreasonable* from the perspective of

justice.[44] When a democratic law is defective but nevertheless *reasonable* from the perspective of justice, the citizens' duty to abide by the results of democratic procedures requires that they uphold the law. But, this duty does not compete here with the duty to promote justice: in circumstances of reasonable disagreement about justice, upholding democratically-enacted law is the proper way for citizens to fulfill their duty to promote justice. On this account, then, decisions count as laws for the community only when they are both democratic and reasonable from the perspective of justice.

Now, one might object to dismissing a citizen's political judgments as unreasonable when they are not compatible with a liberal conception of justice, for the charge of unreason seems quite strong.[45] What is important is that the judgment is not being dismissed as unreasonable *simpliciter*, whatever that might mean, but rather as unreasonable from the perspective of justice. The judgment might very well be reasonable from the perspective of a certain religious faith or other comprehensive doctrine; but whether it is or not is not relevant for the question of whether such a judgment is worthy of being upheld by others as law.[46]

One way of understanding the significance of the notion of the politically unreasonable is to say that a group of people governed by a legal

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[44] As I have discussed before, to say that they do not have this duty is, of course not yet to say that they do not have any duty to do what the law directs, for what the law directs may already be morally required of them.

[45] I thank audience members at Swarthmore College for pressing me on this matter.

[46] It might seem harsh to claim that certain judgments are unreasonable on account of their content—and so unreasonable even when the citizen makes the judgment in good faith and/or is committed to a principle of 'reciprocal equal respect for judgment'—but it only appears harsh, I think, when one focuses solely on the citizen making the judgment and not also on the citizens who might be expected to uphold that judgment as law. Though his characterization of reasonableness is somewhat vague, George Klosko's claim in "An Empirical Approach to Political Liberalism" that "we should employ a minimal conception [of reasonableness], which can avoid controversy as much as possible" risks privileging accommodation of various comprehensive doctrines over arriving at laws that are worthy of being upheld. See Klosko (1998), 133-136.

system will not count as a genuine political *community* unless the scheme of law governing it is justifiable according to some reasonable political conception of justice. A genuine community is what I will call 'a project-dependent group': it only exists insofar as the purported members are together pursuing the project that defines it. As the project of the political community is to realize through governance by law a society of free and equal citizens—this is the point of governance by law—a group does not count as a political community unless it is governed by a legal system committed to the three features constituting the liberal core. For it is only when the legal system is so committed that it is plausible to claim that these people together are pursuing the project of justice. It might be better, then, to replace the distinction between reasonable and unreasonable political judgments with a distinction between 'liberal' and 'illiberal' political judgments, for this latter distinction maintains both the narrower political focus and makes clearer the thought that political judgments must have a certain content if they are to be worthy of being upheld as law.

3. Citizen Interests and the Justification of Democracy

I am going to develop this view by considering the way in which certain interests citizens possess can form the basis for an argument that democracy is morally necessary.[47] The interests are what I call the interest in substantive justice and the interest in participation. The reasonable citizen, I have said, is a citizen who endorses some liberal conception of justice as the

[47] For other accounts of democracy based on appeals to the interests of citizens, see, for instance, Charles Beitz's *Political Equality* (1989) and Corey Brettschneider's *Democratic Rights* (2007).

true or correct conception and makes her political choices accordingly.[48] Because she can be properly understood as pursuing justice in her political choices, her interest in participation gives her a strong claim to an equal opportunity to have a say in democratic governance, a claim that the design of democratic institutions must respect. This is not true, though, of the illiberal citizen. The interest in substantive justice gives the illiberal citizen, like the liberal one, a strong claim to equal participatory rights (such as the rights to vote, to assemble, and to speak freely).

The right to an equal say in democratic governance is required to show proper respect for the citizen's interest in participation, and this interest derives from her more basic interest, as a free person, in the responsible exercise of her moral agency. But, since offering illiberal views about justice is not a responsible exercise of one's moral agency, the illiberal citizen does not have a right to an equal say. And so, certain constitutional constraints on the results of democratic lawmaking are not fundamentally anti-democratic: so long as they only impair the advancement of illiberal views and not liberal ones, they are consistent with the values underlying democratic governance. The illiberal citizen, then, cannot complain if the political institutions are designed to handicap illiberal views in the democratic process.

3.1 The interest in substantive justice

The first interest that citizens possess is the interest in substantive justice, and this interest justifies guaranteeing for all citizens—reasonable and unreasonable—equal participatory rights.

[48] Putting it this way, of course, is idealizing things quite a bit. Most people do not subscribe to a fully developed comprehensive doctrine much less a complete conception of justice, even academic philosophers.

> *The interest in substantive justice*: The citizen has an interest in laws being made that are genuinely laws for a community of free and equal persons.

The claim that democratic governance promotes this interest is the basis for the instrumentalist's justification for democratic governance: democratic governance is justified because (and only because) it leads to better laws from the perspective of justice than other forms of governance. In this way, this interest is concerned primarily with the laws' content and with the citizen as subject to that law. The individual citizen rightly values a great deal the opportunity to live as a free person, to pursue the projects, relationships and commitments she values according to her own conception of her good. And so, it will rightly matter to her that the law and legal system provide her with that opportunity. Since her fellows have the same reasons to value living as free persons—reasons she must recognize—her interest is properly in living not simply in a community that ensures her freedom but in one that ensures equal freedom for her and her fellows.[49] And, because governance by just law is necessary for achieving such a community of free and equal persons, she will have good reason to want the legislative process to select the correct laws.

If, by having and/or exercising certain participatory rights—rights to public advocacy, to assemble, to vote, for instance—the citizen will contribute to this task of selecting just laws, her interest in substantive justice will give her good reason to insist that she have such participatory rights. There are several versions of this sort of instrumental justification. One argues that the participation of the majority of citizens serves a valuable epistemic function:

[49] There is some reason for thinking that living in a just community—a community of free and equal persons—is necessary if a person is to be capable of living a fully flourishing life. In other words, there is some reason for thinking that her own good is promoted by achieving justice for the community in which she lives. For discussion (and a qualified endorsement) of this sort of view, see Ronald Dworkin's *Sovereign Equality* (2000), 263-267.

when a diversity of views are aired and interests represented—including those that, given the social distribution of power, might otherwise be excluded—the laws are reliably better.[50] Another argues that, when all have participatory rights, citizens have strategic reasons to take their fellows' interests into account, and so they make better political choices.[51] Still another argues that exercising such participatory rights improves citizens' virtue—particularly their empathy—thereby improving their political choices.[52] Each account is quite plausible, and they together seem to provide a compelling case that respect for citizens' interests in substantive justice requires giving to each—whether liberal or illiberal —equal participatory rights.[53]

We should note that an instrumental justification can say that, by guaranteeing citizens these rights, the community shows an important kind of respect for them as persons and thereby provides them an important kind of recognition.[54] Because the citizen's having and/or exercising these participatory rights will contribute to the task of achieving a just scheme of law—particularly law that is just towards her and people like her—guaranteeing these rights of co-authorship shows both appropriate concern for achieving justice and recognition that each citizen is someone for whom justice is to be done. The citizen, then, is right to value her possession

[50] See, for instance, Elizabeth Anderson's "The Epistemology of Democracy" (2006).
[51] See, for instance, J.S. Mill's *Considerations on Representative Government*; and Amartya Sen's *Development as Freedom* (1999), 152.
[52] See, for instance, William Nelson's "Open Government and Just Legislation" (2002), 139-149; and Jon Elster's "The Market and the Forum: Three Varieties of Political Theory" (2003), 152-153.
[53] Unless, of course, the number of persons with illiberal views reaches a certain threshold, for then the effects of democracy might then be to make the laws less just and so the citizen's interest in substantive justice would recommend something other than equal participatory rights for all.
[54] Charles Beitz's discussion of equal respect and democratic rights in *Political Equality* mentions this sort of recognition as a valuable expression of respect. See Beitz (1989), 110.

of these rights on account of the expressive meaning attached to such possession. But this sort of respect is a derivative sort of respect: guaranteeing a citizen these rights shows proper respect only when such rights do contribute to achieving just law, for the underlying principle of respect here is respect for persons as subjects of the law, as those who must live according to it and are expected to uphold it. On the instrumentalist view, the citizen has no independent interest in being co-authors of the law that could ground her possession of these rights.

3.2 The interest in participation

According to the instrumentalist, citizens are owed the rights of co-authorship of the laws only if the result of their having and/or exercising them will be better laws. It seems to me, however, that these rights are valuable for citizens apart from any such instrumental value they might have. In other words, it seems to me that the citizen has an interest in participation separate from her interest in substantive justice:

> *The interest in participation*: The citizen, insofar as she is reasonable, has a separate interest in having a say in the selection of laws, one equal to the say had by her fellows.[55]

This claim that co-authorship or participation is valuable in itself, however, faces an important objection from the instrumentalist:

> So long as the scheme of laws is just—so long as citizens may exercise those rights constitutive of equal freedom in their daily lives—the political community fully respects her and her fellows as free and equal citizens. Why think that she also has reason to value, in itself, the chance to participate in selecting the laws governing her such that she has a right to an equal say?

[55] Notice that this interest includes both a comparative and noncomparative component: she has reason to value having *some* say but also to value having an *equal* say. The first component rules out satisfying the second by depriving all of a say.

The liberal citizen has this separate interest in participation, I argue, because denying her the right to an equal say publicly expresses an important kind of insult—that she is not a full and equal member of the community—and so, by guaranteeing her this right, the community publicly recognizes her as a full member of the community, recognition she has reason to value.

Of course, claims about expressive meaning—here, the meaning of guaranteeing or denying citizens the right to an equal say—are problematic because it may be that the meaning need not be attached to the act in question. If the participatory rights are, as the instrumentalist claims, only valuable insofar as they contribute to just law-making, then it seems this expressive meaning should not attach to the right to an equal say: some citizens are simply not skilled at law-making, but possession of such skill should have no bearing on their status as full members of the community. The appropriate response, if the instrumentalist is right, would be to decouple the possession of the right to a say from full membership in the community so that the distribution of participatory rights may be determined solely by their instrumental value with that distribution expressing any denial of full membership in the community.

The instrumentalist's objection would succeed—the citizen, it seems to me, would not have a separate interest in participation—were reasonable disagreement about rights and justice not a problem to be solved by law. But, as I argued in Chapter IV, reasonable disagreement is unavoidable in a liberal political society and poses an important moral problem that is the task of law to solve. And, I argue, it is when the citizen confronts reasonable disagreement about justice—when her political views and those of her fellows are liberal but conflicting—that she and her fellows each have a right to an

equal say grounded in an interest in participation: In this context, the right to an equal say is required to show proper respect for the citizen as free and equal and so denying some reasonable citizens, say, the right to vote cannot help but express an important kind of political insult in addition to the expression of disrespect the instrumentalist admits.

Why is it that when the citizen's views about rights and justice are reasonable, she may to insist on having the right to an equal say? Crucially, the citizens whose views about rights and justice are reasonable—and so who reasonably disagree with each other—have done all that may be expected of them as responsible citizens committed to the task of justice. Their disagreement about a particular legislative question concerning the definition of a liberal rights is a result, not of a failure of some to fulfill their deliberative responsibilities, but rather of the burdens of judgment, and so one cannot justify excluding any one of them from the deliberations for faulty, negligent or bad-faith reasoning. In this sort of case, the question is no longer simply what the best law is from the perspective of substantive justice but rather what the community's law should be given that these citizens, after deliberating responsibly, still disagree about what the best law is. In this situation of reasonable disagreement, the question of what their law should be cannot, from the perspective of justice, be settled solely on content-based grounds, for each citizen's status as free and equal is now at stake in a new way.[56]

How is the citizen's status as free at stake in a new way here? Properly valuing one's own freedom as self-determination requires, in part, valuing the

[56] On my account, then, it is only in circumstances of reasonable disagreement that the proper (because respectful) response to the disagreement is a retreat to procedure. By restricting this tactic of retreat to these circumstances, my account avoids the infinite regress of retreats that Estlund points out is a problem for standard proceduralist accounts of democracy. See Estlund (2008), 70-72.

ability to develop and pursue one's own projects, cares and commitments. In this way, we can understand the citizen's interest in substantive justice as an interest that the laws that are selected respect and promote this ability. But properly valuing one's own freedom also requires valuing the responsible exercise of one's own moral agency, particularly in morally significant situations or with regard to morally significant questions. In other words, properly valuing one's own freedom requires, at times, thinking that it is itself important that one act on one's own moral judgments. When a person acts on her own moral judgments in a situation, what happens—both her actions and their consequences—expresses her own moral sensibility, and so what happens counts as hers in an important sense, as part of her moral world that she has created. And, by acting on her own moral determinations, she takes responsibility for and invites others to hold her responsible for what happens, thereby demanding from them recognition as a fellow moral agent.[57] In this way, a person has reason to insist at times that she be able to exercise her moral agency responsibly and that, when she does, others treat her as a conscientious moral agent.

That a person will at times have reason to insist on this ability to exercise her moral agency seems especially clear in cases of reasonable disagreement between persons about morality. Persons can face reasonable *moral* disagreement because there is no reason to restrict the effects of the burdens of judgment to political questions of justice: human persons face these same obstacles when reasoning about any complex moral question or hard moral case. What is important here is that, when a person faces a

[57] And recognition as a reasonable one, since it seems implicit in a person's acting on her own judgment that she takes her judgment to be right and so also reasonable.

reasonable disagreement about an important moral question, what makes it reasonable is that, in her deliberations, each has done what a responsible moral agent may be expected to do. And so, each of them thereby has reason to insist on being treated as one, including reason to insist that her judgment in this case be respected. In normal cases, respect for her judgment requires allowing her to act on her judgment.[58]

Questions of rights and justice are certainly morally significant ones, and the community via its laws must come to one answer to them. As someone subject to these laws, the citizen will have important reasons to insist that, insofar as her views are reasonable, she be able to exercise her moral agency with regard to these questions. Proper respect for her requires here respect for her judgment. Of course, since her fellow citizens have this same interest in the responsible exercise of their own moral agency—and so their judgments are owed the same sort of respect by the community insofar as they are liberal—she has reason to insist only on the greatest basic opportunity to exercise her moral agency with regard to questions of rights and justice consistent with her fellows having an equal basic opportunity. In this way, by guaranteeing all liberal citizens the right to an equal say in legislation concerning questions of rights and justice, the community shows proper respect for each reasonable citizen's interest in participation, an interest grounded in her more basic interest in responsibly exercising her moral agency, by recognizing her not just as a subject of the laws but also as a responsible co-author of them.

[58] By 'normal cases,' I mean cases that do not involve persons acting together or in concert but rather involve the person acting on her own. When the question is not 'What ought we to do?' but merely 'What ought I to do?' respect for my interest in exercising my moral agency in this case requires that you allow me to act on my own (reasonable) judgment of what to do. To interfere in this case would be to impose your own judgment of what I am to do, and this imposition would be disrespectful.

And so, by possessing (and exercising) the right to an equal say, the liberal citizen achieves a valuable sort of recognition. This recognition is as a responsible co-author and is connected to the particular task of law-making in circumstances of reasonable disagreement. It includes: (a) recognition as someone who is concerned that justice be done; (b) recognition as someone with a liberal (and so reasonable) view about how justice is to be done; and (c) recognition as someone who is committed to the project of achieving justice as a community. Importantly, the liberal citizen achieves this recognition even if the candidate laws she supports are not enacted into law by the community, for it is her inclusion in the arena of democratic debate and decision and not the success of her particular view that matters here. And, even though she cannot insist on having more than an equal (and so very slight) opportunity to have her say about questions of justice, her interest in participation still gives her important reasons to insist that she, insofar as she is reasonable, be given at least that.

Others who claim that citizens have a separate interest in participation do not make this connection between this interest and reasonable disagreement about rights and justice. For Thomas Christiano, every citizen has an interest in participation because

> [E]ach person has an interest in having her moral personality acknowledged and respected by her fellow citizens. Each person, qua person, has the capacity of understanding and appreciating what is valuable… To exclude a person from participating in the processes by which the choice of how the society is to be regulated is to fail to acknowledge that person's capacity for moral judgment and to treat her like a child or an animal.[59]

And Charles Beitz argues that, because "political procedures define the terms

[59] Christiano (2008), 93.

on which citizens recognize each other as participants in public deliberation and choice," when procedural roles seem distributed, for instance, according to racist criteria,

> those singled out as less worthy are demeaned and insulted; they are encouraged to feel that patterns of disrespect that exist in society at large enjoy official sanction… The political roles defined by democratic institutions should convey a communal acknowledgment of equal individual worth.[60]

Now, Christiano and Beitz are certainly right that the assignment of procedural roles and rights are liable to send these messages about respect for moral personality and the equal worth of persons. But the assignment of these roles and rights sends these broader messages, it seems to me, because it already sends narrower messages about the citizen and the pursuit of justice in circumstances of reasonable disagreement, ones that in normal circumstances imply these broader ones.

When a citizen is denied the right to an equal say and so is denied recognition as a responsible co-author, the messages this particular denial sends will often imply these broader messages because it is normally also a denial that she is someone for whom justice ought to be done along with her fellows. When the denial of the right to an equal say includes the denial of specific participatory rights, the content of the resulting laws almost invariably (and so predictably) fail to take into proper account those citizens' interests as free persons, depriving them of their rights and/or the means to exercise their rights.[61] Not only, then, does the denial of participatory rights

[60] Beitz (1989). 109-10.

[61] Remember Waldron's remark that the claim that persons have certain moral rights seems to imply some claim that they are competent, responsible and autonomous agents: "the attribution of rights to individuals is an act of faith in the agency and capacity for moral thinking of each of those individuals" (Waldron (1999b), 222). It seems to me that, when we deny some persons basic rights to participate in political process, that denial sends a message

deprive citizens of recognition as responsible co-authors of the law, but it also has a predictable corrosive effect on the quality of the laws enacted. In other words, the denial of participatory rights is normally also a denial that the citizen in question has an interest in substantive justice. And, it is when these two denials are conjoined—as they normally are when institutions deny citizen participatory rights—that the denial of an equal procedural role sends the larger messages about disrespect of moral personality or unequal worth of persons that concern Christiano and Beitz.

Someone might object that, in political communities of many citizens, each with this same interest in participation, no citizen will have a say with any real potential to be decisive for any decision. And, the objector continues, since no citizen's participation will have any practical effect, this participation—by, say, exercising the right to vote—cannot plausibly count as an exercise of moral *agency*. A citizen's vote might still express her convictions about justice or her commitment to the community, but that seems a far cry from an exercise of moral agency.[62] In this way, even if she does have a separate interest in participation, it cannot be grounded in her more basic interest in responsibly exercising her moral agency.

Let us admit for the sake of argument that the citizen is justified in not valuing the act of voting as an important exercise of her moral agency. Even so, the citizen will have good reason to value *possessing* the right to vote, whether or not she exercises it, because the community cannot justify denying her this right while giving it to others in a way consistent with respecting her

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about their lack of competence, responsibility and/or autonomy that invariably affects how seriously we take the claims that they have other rights when we make our political choices.

[62] For an account of the rationality and morality of voting that is based on the expressive significance of voting, see Geoffrey Brennan and Loren Lomasky's "Toward a Democratic Morality" (2002).

as someone with an interest in responsibly exercising her moral agency. That she is one among many may give the citizen reason not to value exercising her right to vote; but the community must still guarantee her that right, for she has as much of an interest as anyone else in responsibly exercising her moral agency with regard to questions of justice.[63]

3.3 Participatory rights and the right to an equal say

The citizen's interest in substantive justice requires that she be guaranteed equal participatory rights, including the rights to vote, to assemble, and to speak freely. And this holds whether her views are liberal or illiberal. The citizen's interest in participation requires that, insofar as she is reasonable (from the perspective of justice), she be guaranteed the right to an equal basic say in governance. This interest also requires that she be guaranteed equal participatory rights, since they are important constituents of a right to an equal say. For the reasonable citizen, then, participatory rights have a double justification. But this interest in participation has potentially a wider procedural reach than the interest in substantive justice, for the participatory rights do not exhaust the right to an equal say. Because institutions structure debate and deliberation, they affect whether citizens are guaranteed such a right. And so, political institutions must be designed so as to allow liberal citizens this right to an equal say.

[63] In circumstances of reasonable disagreement, denying a citizen the right to participate cannot express the claim that the people denied this right are denied it because they are simply mistaken about justice. Because all human persons are subject to the burdens of judgment, what such a denial will express, at best, is the claim that those doing the denying *reasonably think* that those others, though also reasonable, are mistaken about justice. And those citizens cannot appeal to their interest in responsibly exercising moral agency to justify denying these others the right to participate as a responsible exercise of their agency, for this denial is the denial that these others, though reasonable like them, have an interest in responsibly exercising their moral agency.

3.4 Reasonable disagreement and institutional design

When a citizen's views about some political issue or question are unreasonable from the perspective of justice—when they are illiberal—she does not have a right to an equal say in that decision. Because her views fail to respect her fellows as free and equal, respecting her interest in participation does not require that the institution give her view equal standing, because, in this instance, she is not acting as a responsible fellow author of the law. And so, if institutions work to promote substantive justice by preventing illiberal views from prevailing in the democratic arena of debate and voting—as they surely can—she has no complaint grounded in her interest in participation against such institutions. Even though they are not procedurally neutral, these institutions are consistent with a commitment to democracy.

As I have said, a citizen with illiberal views may not be denied the participatory rights that are given to her fellows, for that citizen's interest in substantive justice requires that she have the same basic participatory rights. There are, however, other ways that institutions can discourage illiberal views from prevailing. Familiar mechanisms have this effect, such as rules requiring public deliberation among elected representatives prior to voting, rules requiring approval by the relevant legislative committee before consideration by the entire assembly, or a constitution containing a list of enumerated basic rights that all legislation must respect. Indeed, a democratic constitution with a guaranteed set of basic rights can be understood as specifying in general terms those rights, liberties and opportunities that any reasonable conception of justice must endorse. And, by establishing these rights as uncontroversial baselines in political deliberation, the constitution guides democratic deliberation towards considering only what is justifiable according to liberal

conceptions of justice. It does not insist on a particular interpretation of those rights—the rights are specified quite generally—but rather only that they be guaranteed according to some liberal interpretation, and it leaves it up to the political process to select some interpretation.[64] By discouraging illiberal views in these ways, institutions can improve the quality of the laws without endangering their participatory and so democratic credentials.

Institutions may not, however, discourage any of the liberal views from prevailing over others in the legislative process, for, were citizens to implement such institutions, they would thereby fail to respect the interests in participation of those whose reasonable views are excluded and so would fail to respect them as equal participants in governing.[65] Roughly put, then, once the disagreements about justice to be resolved by law are reasonable ones, the citizens' interests in participation come to the fore while their interests in substantive justice recede. And so, at this point, the design of institutions to select laws must be guided primarily by a concern to realize procedural fairness among reasonable citizens rather than by a concern to select as law the correct view of justice. And so, it is only in the realm of reasonable disagreement about justice that the majoritarian procedure favored by

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[64] Waldron has pointed out one bad effect written bills of rights can have on deliberation: "Think of how much more wisely capital punishment has been discussed (and disposed of) in countries where the debate has not had to centre around the moral reading of the phrase 'cruel and unusual punishment,' but could focus instead on broader aims of penal policy and on dangers more morally pressing than 'unusualness,' such as execution of the innocent" (Waldron (1999b), 290). But this effect may not be a problem if we may be guided in our debates by a bill of rights without our debates becoming debates about how to interpret key phrases or terms in that bill of rights.

[65] This is not to say that the need to promote citizens' interests in substantive justice cannot still inform institutional design at this stage. It may, for instance, give us reason to build into our procedures and institutions mechanisms that can be shown to be generally effective at promoting successful decision-making. A variety of mechanisms that promote free and robust deliberation among citizens (or their representatives) seem to fit the bill here, for we have reason to believe that such deliberation generally leads to better decisions. What is important is that the justification for such mechanisms be neutral among competing reasonable views.

Waldron is required in order to respect citizens as free and equal participants in governing, for it is only reasonable judgments about rights and justice that merit the sort of respect that the procedure shows.

The basic point here is that institutional efforts to promote citizens' interests in substantive justice must nevertheless allow law to do its job, and the job of law and the job of law, as I have argued, is to resolve disagreements in a way consistent with free and equal citizenship. Joseph Raz has noted that, in order to do its job, a practical authority must issue its judgment on a particular question in such a way that those subject to it can both understand the judgment's content and recognize its authority without deliberating themselves and coming to a particular view about that question.[66] A legislative process, then, must select the community's law on some question of rights or justice in such a way that citizens are able to recognize it as law and understand what it requires of them no matter what (reasonable) substantive view, if any, they themselves adopt about the underlying question of justice.[67]

Granted, Raz's argument here is based on the claim that the purpose of an authority is (1) to give its subjects practical directives that are better than the judgments they would have made themselves while also (2) relieving them of the work of deliberating for themselves.[68] But Raz's instrumentalism is mistaken, at least when it comes to political authority: the primary purpose of political authority is to adjudicate disagreements about rights and justice

[66] Raz (1986), 53. See also Waldron (1999b), 95-96.
[67] These claims about authority play a large role in Raz's argument for legal positivism over natural law: law as the natural lawyers conceive of it could not be authoritative in the way it claims to be because recognizing a purported law as authoritative law requires deliberating for oneself about the matter the law is about.
[68] This is the thrust of what Raz calls 'the normal justification' for practical authority. For Raz's account of the justification of authority, see Raz (1986), 23-69.

among citizens in a way that respects all as free and equal.[69] The basic thrust of Raz's claim remains, however: if the question of the law's authority depends on the question of whether particular laws are the right ones for a community of free and equal persons, we would be no closer to the goal of coming to one view about collective questions of justice in a way that respects all as free and equal, for our disagreements about rights and justice are simply reformulated into disagreements about the authority of the laws.[70] Were institutions to discourage any of the liberal views from prevailing over others in the legislative process, the justification of those institutions as productive of authoritative law would involve taking a stand on issues that are subject to reasonable disagreement.

3.5 Estlund's argument against proceduralism

There remains, however, one important objection to be addressed. In his *Democratic Authority*, David Estlund claims that any argument for democratic procedures grounded solely in the need to achieve procedural fairness among citizens will be unable to explain why we should prefer democratic procedures—in particular, a majoritarian voting procedure—over, say, a coin flip or some other game of chance, since a game of chance is just as fair a procedure as any democratic one. He concludes that a successful argument for democratic institutions must include some claim that such institutions have some comparative epistemic merit, that they are more successful than other fair procedures at selecting just laws.[71] Since I have

[69] This view of the proper justification of political authority, which I argued for in Chapter IV, is Kant's view and (arguably) Rawls'.
[70] This claim is essentially what Waldron calls 'normative positivism' about law. See Waldron (2001).
[71] Estlund (2008), 8, 82-3.

claimed that, once we are in the realm of reasonable disagreement among citizens, democratic institutions are only justified so long as they are procedurally fair and so neutral among reasonable views, I must explain why democratic procedures are required there rather than a coin flip.

Estlund is right that it would be inappropriate to select one view to be law by flipping a coin. But it would be inappropriate not, as he argues, because a game of chance would be less likely to select the just law, but rather because of the kind of disagreement—disagreement about rights and justice—that law is to resolve. Because what is at stake are important questions of rights and justice, the procedures used, even if they must be neutral among competing reasonable views, must nevertheless still be responsive to the citizens' concern that just laws be selected. And only democratic procedures, not games of chance, are both neutral and appropriately responsive to this concern.

When a law is selected by a coin flip, the justification for its selection over the other reasonable views on offer has nothing to do with citizens' views about what the law ought to be: 'This is our law because the coin landed on heads.' When a law is selected by a democratic procedure, on the other hand, the justification for its selection over the other reasonable views depends, in part, on the fact that it was reasonably thought by some to be the correct law: 'This is our law because the majority (reasonably) thought it the correct law.' In this way, when the community selects a law democratically, even a citizen who disagrees with the particular law selected can see that the community, via its adherence to democratic procedures, is oriented towards selecting just law. When the community resorts instead to a dice roll, it is no longer pursuing just

law but rather something else, perhaps accommodation.[72] A reasonable citizen who disagrees with some law, then, has some reason to respect it when it is chosen democratically—it is the community's best determination of just laws—that she lacks when it is chosen because a coin landed on heads.

Of course, the reasonable citizen cares that the candidate law she thinks correct be selected. She does not, however, simply want her candidate law to be selected, no matter the reason for its selection. She wants it to be selected on the grounds that it is the correct one. And so, even if her candidate law were selected, but on other grounds—because of the results of a coin flip—she would be unable reasonably to view the community's scheme of law as aspiring to justice—even though, on her view, it got it right this time—for the procedures for selecting the law would belie such an aspiration. And so, democratic procedures are required over games of chance, not because they are epistemically better, but because it is only with democratic procedures that citizens can recognize the community's project of governance by law as a project of pursuing justice.[73]

4. Democracy and the Claims of Conscience

As it stands, this account might seem to offer the framework for a complete account of the authority of democracy and so of the citizen's duty to uphold democratic law:

> The citizen has a duty to uphold laws that are reasonable and democratic, even ones she reasonably disagrees with, because

[72] I'm assuming here, of course, that majority decision is an option and so that there is not a tie that must be broken somehow. It does seem to me, however, that, even in those cases where there is a tie, flipping a coin or rolling dice is an unsatisfactory way of reaching a resolution on questions of justice.

[73] This argument is similar to Dworkin's argument in *Law's Empire* against "checkerboard laws" as the appropriate and fair compromise in circumstances of disagreement. See Dworkin (1986), 178-184,

> doing so is required for her to respect properly her fellow citizens' interests in participation. The citizen does not have a duty to uphold laws that are democratic but unreasonable, because proper respect for her fellow citizens' interests in participation does not require respecting these judgments that, in their content, fail to respect all citizens as free and equal.

I do not think that it does yet offer such a framework. Consider the perspective of the reasonable citizen when she finds herself with a duty to uphold reasonable and democratic law. She may find this duty objectionable when she notices that it will sometimes seem to her to be, in practice, a duty to uphold law that, on her own reasonable view, conflicts with her deeply-held convictions about justice and rights.[74]

As a reasonable citizen, she recognizes that she and her fellows all face the burdens of judgment and so that these laws are reasonable ones, but this recognition is compatible with her conviction that the laws are nevertheless unjust, perhaps even deeply so.[75] In this sort of situation, the duty to uphold the law will seem to her to be an imposition that forces her to be unjust (or, at least, forces her to support or participate in injustice) and so she may plausibly regard the duty as infringing on her freedom. She faces here what reasonably seems to her a conflict between justice and democracy, between whether she should abide by democratic law or the deliverances of her own conscience about justice.[76]

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[74] I am taking a person's convictions about the permissibility of abortion and whether it ought to be available to be examples of deeply-held convictions. And I follow Rawls in thinking that there are both pro-choice and pro-life views that count as reasonable. See Rawls (1999b), 169-170.

[75] The extent to which my sort of view allows that this is possible will depend on what it takes to be the scope of reasonable disagreement about rights and justice: the wider the scope, the greater the possibility. I am unsure about this question of the scope of reasonable disagreement, for it is a very complex question. But I do think that the scope is wide enough that the possibility that a reasonable citizen will face this sort of situation is large enough to pose a problem for liberalisms of freedom.

[76] It is when we consider this sort of situation, I think, that the force of Wolff's and Simmons' views becomes clear: anyone committed to an ideal of individual freedom as self-determination—an ideal of personal autonomy—ought to find these sorts of situations

This worry is important for liberalisms of freedom because, if the duty to uphold the law does infringe on the citizen's freedom in this way, the ideal of a community of free and equal citizens is not, in the end, a fully realizable ideal. As I have argued, governance by law is necessary if persons are to achieve free everyday (i.e., non-political) interactions with each other, and governance by reasonable and democratic law is necessary if citizens are to be free as co-authors of those laws. Achieving governance by such law, then, is required if citizens are to live in a community in which persons both interact freely in non-political contexts and legislate together freely.[77] But, if governance by democratic law cannot help but sometimes put citizens in situations where they face this sort of conflict between justice and democracy, the problem that disagreement poses for the project of a community of free and equal citizens cannot be fully solved.

Granted, this force the citizen feels to be imposed on her by the duty to uphold democratic law is of an unusual sort, since it is not physically coercive: she acknowledges the moral reasons as set out here for upholding reasonable and democratic law, but she is also committed to living justly—to seeing justice done in her own actions—and, from the perspective of this commitment, she cannot help but see her citizenship in this democratic community as at times forcing her to live unjustly. And being forced in this way does seem a kind of unfreedom that should concern a liberalism of freedom, for then this citizen seems to have a freedom-based objection to the duty to uphold even reasonable and democratic law. This objection's force

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troubling, particularly because the problem arises not because the person is self-interested but because she is concerned to live morally.

[77] Importantly, citizens are free in these two ways whether or not they recognize the community's achievement of governance by democratic law as making that freedom possible. These kinds of freedom are similar, then, to what Rousseau calls "civil freedom": you possess it whether or not you realize you do. For relevant discussion, see Neuhouser (2000), 78-81.

derives from the implicit claim that freedom has a subjective component: To be free requires, in part, that one act according to one's own deepest convictions, including one's convictions about justice.[78] Call this objection to the duty to uphold democratic law 'the conscience objection.' If the reasonable citizen does have this objection to the duty, the most to which a liberalism of freedom may aspire will be a community in which citizens are necessarily unfree in some ways.

It would be a mistake to minimize or dismiss the conscience objection by responding that 'democracy is not always easy' or 'doing the right thing is not always easy,' for such responses fail to see that the citizen's complaint is not the childish complaint that she cannot do what she wants but rather the more sober one that she cannot choose in important circumstances to act according to the deliverances of her own conscience. Joshua Cohen has argued in a different context that we can only understand the importance of religious liberty for a person if we "take seriously the stringency or weight of the demands placed on the person by her reasonable moral and religious convictions… given their content. It is precisely this stringency that compels reasons of especially great magnitude for overriding those demands."[79] My claim here is that, insofar as Cohen is right about the significance of the weight of a citizen's religious convictions, we ought to take just as seriously the stringency or weight of a person's reasonable convictions about justice. Most of us, I think, are willing to acknowledge the (at least prima facie) strength or urgency that claims of conscience have for a person—especially someone

[78] This claim that freedom has a subjective component is not new. Frederick Neuhouser finds it, for example, in both Rousseau and Hegel. See his *Foundations of Hegel's Social Theory* (2000), especially Chs. 2 and 3.
[79] Cohen (2003), 20.

morally engaged and reasonable[80]—and so we should recognize that this person will reasonably feel unfree when she is unable to act in accordance with those claims of conscience, even when they are claims about justice.[81]

A complete account of the authority of democracy and so of the duty to uphold democratic law must respond to this conscience objection. So far, the account has considered the question of political obligation from two perspectives: that of an individual trying to carry out a plan of life in a world with others attempting the same thing, and that of a reasonable citizen as one author among many of her community's laws. To respond to the conscience objection, we need to consider the question from the perspective of the reasonable citizen who must uphold a law that she thinks unjust. When we do so, we will see that the account of democratic politics presented here is importantly incomplete. Achieving democratic institutions is not enough; what is required is a democratic community. The final two chapters together develop this response to the conscience objection and, by doing so, they complete my account of the duty to uphold the law in a democracy.

[80] For discussion of the notion of conscience, see Thomas E. Hill's "Four Conceptions of Conscience" (1998). Hill endorses a Kantian understanding of conscience as "an 'inner judge' who scrutinizes our conduct" that requires that "each of us… in the end, treat our own (final) moral judgments as authoritative, even though they are fallible" (Hill (1998), 17). In response to Hill's discussion of conscience, Elizabeth Kiss notes that "a capacity for empathic connection with others… underlies the urgings of conscience." And so, she argues, "[t]he core of the problem is not inadequate self-scrutiny but a cramped of shattered capacity for emotional identification with others" (Kiss (1998), 73). I do not think that Hill's and Kiss's accounts are ultimately incompatible.

[81] That the claims of conscience are morally significant seem assumed, for instance, in discussions of the possibility of both justified civil disobedience and justified conscientious objection.

VI. FRIENDSHIP, DEFERENCE AND MORALITY

The problem of political obligation that a liberalism of freedom confronts is how an individual might be subject to the law's authority without that subjection infringing on her freedom. The previous two chapters have begun the task of providing a solution to this version of the problem. But the account still must confront the sort of situation that many accounts of political obligation have found most troublesome: that of a reasonable and engaged citizen confronted by a reasonable law that she thinks unjust, even deeply so. How can it be that she has a duty to uphold that law and yet remains free? This chapter and the next together develop an answer, thereby completing the account.

The duty to uphold the law is an instance of a more general sort of duty, what I will call a duty to *defer* to another. What exactly do I mean by 'deference'? Roughly put, to defer to another is to do something not because you judge it to be the appropriate, right or good thing to do, but because that other judges it to be so.[1] More precisely, to defer to another is to treat that person's judgment that you should do *x* in some situation as by itself a conclusive reason for you to do *x*, or, in other words, as a strong reason to do *x* that also disallows acting on your own judgment of what to do in the situation (where 'the situation' here excludes the fact of the other's judgment).[2] By

[1] The sort of deference I am concerned with here, then, is not epistemic deference: the other is not an expert and you need not think you have reason to believe that her judgment is correct. The sort of deference I am concerned with, then, is better described as *practical* deference: though you may still disagree with her, that she makes the reasonable practical judgment she does gives you sufficient reason (and here, conclusive reason) to let her decide what you are to do. Like mine, Soper's argument that friends have a duty to defer to each other is concerned with practical, not epistemic, deference. See Soper (2002). 35-38. In her observation that a friend's judgments, because they are your friend's, "may provoke [y]our reflection or, even, deference," Friedman does not specify whether she means epistemic or practical deference. See Friedman (1993), 191.

[2] The reason provided by the other's judgment will likely be only presumptively conclusive: though it presents itself as a reason according to which you must act, there are other reasons that, were they also present, would outweigh or override it.

deferring to another, you replace in your deliberations your judgment of a situation with that other person's, and you do so *not* because you think that other person's judgment is correct but rather simply because it is hers.[3]

I will argue in this chapter that the duty to uphold the law is not the only case of a duty to defer: A close friend has a duty sometimes to defer to his friend's judgment about what he is to do, even when he disagrees with her judgment. This duty is a constitutive duty of the relationship of close friendship: proper care for a friend is, in part, care for her as a free person, and properly caring for her as a free person sometimes requires deferring to her judgment.[4] And so, a person's close friendships can at times make it the case that he may not act on his own practical judgments.[5]

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[3] Those who have read Chapter I or are familiar with Joseph Raz's account of authority will notice that, when you have a duty to defer to a person's judgment in the sense I am concerned with here, that person's judgment will be, on Raz's account, practically authoritative for you. For Raz's account, see Chs. 2-4 of his *The Morality of Freedom* (1986) and his *Practical Reasons and Norms* (1999). For a similar (and shorter) account, see John Gardner and Timothy Macklem's "Reasons" (2002), especially Section 6. Now, some might object that, since authority-relations are clearly incompatible with friendship, friends cannot have a duty *of friendship* to defer to each other. To say that a friend's *judgment* can be authoritative, however, is not yet to say that she can be *an authority*. On a standard use of that term, to be subject to an authority is to stand in a non-reciprocal relationship of regular deference to that person's (or institution's) directives. Since my claim is that friends sometimes must defer to each other—and so that one friend must in some instances and the other must in other instances—neither friend counts as an authority and so they do not stand in authority-relations towards each other in the sense that should trouble defenders of friendship.

[4] That one's friendship with another can give one a duty to defer to that other is not much discussed in the literature on friendship. One notable exception is Philip Soper's *The Ethics of Deference* (2002). Michel de Montaigne also seems to include something like a duty to defer in his discussion of perfect friendship, though whether he does is complicated by his insistence that perfect friends, because of their knowledge of and influence over each other, do not disagree with each other about what to do. See Montaigne (2005), 10-13.

[5] By close friendship I mean that kind of close voluntary personal relationship between unrelated persons that is neither sexual nor romantic but is more intimate than, say, 'work' or 'school' friends or any other friendship that depends in large part on proximity for its survival. I say more later about what I take to be distinguishing features of this sort of friendship. But the kind I am concerned with is what Aristotle takes to be the core instance of friendship in the *Nicomachean Ethics* and what concerns most philosophical treatments of friendship, from Montaigne and Kant to Laurence Thomas, Marilyn Friedman and Dean Cocking and Jeanette Kennett. As will become clear, however, I am not concerned, as both Aristotle and Montaigne arguably are, with the ideal 'perfect' or 'complete' friendship in which the friends are of the same mind to such an extent that they never disagree. This sort of friendship is unattainable, and a focus on it obscures important questions about the ways in which the friends' relationship affects how they are to handle disagreement.

That close friends have such a duty to defer is a significant result in its own right, for it tells us something important about this central human relationship. And one main aim of this paper is to establish that this duty is a constitutive duty of friendship. To do so, it makes use of a justificatory strategy recently sketched by Samuel Scheffler. In his "Relationships and Responsibilities," he notes that "to attach non-instrumental value to my relationship with a particular person just is, in part, to see that person as a source of special claims in virtue of the relationship between us."[6] And he argues that we can justify a person's special responsibilities by showing that (a) the relationship in question is a non-instrumentally valuable one and (b) she cannot value this relationship in the right way without seeing herself as having these special responsibilities.[7] My argument here is that a friend cannot value his friendship in the right way—specifically, as a relationship of mutual care between *free* persons—without seeing himself as having a duty sometimes to defer to his friend.[8] And Scheffler's focus on proper valuing of the relationship allows us to identify those responsibilities that are constitutive duties of the valuable relationship of friendship, that is, those the friend has not primarily because fulfilling them is instrumental to preserving the friendship but rather because fulfilling them is part of what is required if

[6] Scheffler (2001), 100.
[7] Scheffler's view is a particularly attractive one because, by requiring that the relationship actually be valuable—and not just thought valuable by participants—it avoids the implausible consequence that all felt obligations as such are genuine obligations. See Scheffler (2001), 102-103. For a view that felt obligations arising out of valuing a relationship are thereby genuine obligations, see Yael Tamir (1993), 96-102.
[8] Alternatively, my argument here is that a friend cannot love the other in the manner appropriate of close friends without seeing himself as having a duty sometimes to defer to him. For an account of loving another as, in part, seeing oneself as having certain sorts of reasons to act in that person's interest, see Niko Kolodny's "Love as Valuing a Relationship" (2003), especially 150-3.

they—he and his friend—are to count as friends at all.[9] My idea is that because deferring to his friend is sometimes *the* appropriate way for him, as her friend, to care for her as a free person and because such care is a constitutive feature of friendship, the duty to defer is a constitutive duty of their relationship of friendship.[10]

But this result—the duty to defer is a constitutive duty of friendship—also matters, I argue, for what might be called 'the problem of loyalty.' It is a common-sense thought that participants in various kinds of valuable relationships, including familial relationships, friendships, romantic relationships and (more controversially) citizenships, have special responsibilities (or duties)[11] to give certain of their fellows' interests priority. These relationships purport to give us important reasons of loyalty to act for

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[9] In this way, my argument differs from Soper's argument in *The Ethics of Deference* that friends sometimes have a duty defer to each other, for his argument focuses on what he calls 'instrumental reasons' for deference. When deciding whether to defer to a friend's judgments, "I must take into account not only my partner's disappointment if I do not defer, but also the potential impact on the relationship"; and deference can be required for these reasons when deferring "contributes to the preservation of the larger good represented by the relationship." See Soper (2002), 25, 163. My claim that the duty to defer is a constitutive one is different, for, as a constitutive duty, I can have it even though fulfilling it may end the friendship rather than help preserve it. It is a familiar phenomenon that sometimes being a good friend requires risking the demise of the friendship. Imagine, for instance, cases in which one friend must, as a friend, tell the other some unwelcome truth, knowing all the while that their friendship will not survive such truth-telling. For more on constitutive duties and friendship, see Raz (1989), 19 and Raz (1986), 212. One strength of Niko Kolodny's account of love as a kind of valuing whereby you see yourself as having reasons to act both in your beloved's interest and in the interest of your relationship with her is that the account not only allows for such conflicts between being a good friend and preserving the friendship but also understands them as conflicts internal to loving. See Kolodny (2003), especially 150-1.

[10] My argument represents, to some extent, an addition to David Velleman's account of love in his "Love as a Moral Emotion." Velleman argues that love is "an arresting awareness" of the beloved's value, specifically an awareness that arrests "our tendencies toward emotional self-protection from another person, tendencies to draw ourselves in and close ourselves off from being affected by him." See Velleman (1999), 360-1. If my argument here is right, love for a friend arrests not only our tendencies to emotional self-protection but—insofar as it is love for the friend as a free person—also arrests our tendencies toward what might be called practical or deliberative self-protection.

[11] I am using duty and responsibility interchangeably here in part because I agree with Raz's claim in "Liberating Duties" (1989) that a duty need not, as is often assumed, be felt by its bearer as an imposition or a burden but rather may be felt by its bearer as a requirement that she is willing and happy to fulfill. That a duty presents itself to you as a reason according to which you must act need not mean you feel this necessity as a fetter.

the sake of our fellows, reasons that compete with our other moral reasons. But it is controversial whether and, if so, how these special responsibilities can be morally justified. Can a person, for instance, ever be justified in doing something for the sake of a close friend that, were she not his friend, would be wrong for him to do?

Consider the following case, adapted from one in the film *Death in Brunswick*.[12] It involves two close friends Carl and Dave:

> Carl works as a cook at a nightclub. One evening his kitchen helper Mustapha is badly beaten in the alley, and Mustapha is told that Carl was responsible for it (he wasn't). That night, Mustapha goes after Carl in anger but, in doing so, impales himself on the large fork Carl is holding and dies. Carl calls his best friend Dave in a panic. When Dave arrives and sees the body, Dave decides that they must call the police. But Carl pleads with him not to: with his reputation, it will be hard to convince people of what really happened, and he cannot cope with being sent to jail. Carl decides that they must get rid of the body instead. They remove Mustapha's body, break into a coffin at the cemetery where Dave works, and place the body in it along with its original occupant. Afterwards, they tell Mustapha's wife and son that they have no idea why Mustapha has gone missing.[13]

In their treatment of the *Brunswick* case in "Friendship and Moral Danger," Dean Cocking and Jeanette Kennett argue that, by helping Carl avoid the risk of jail, Dave acts as a loyal friend should, but, by hiding Mustapha's body, desecrating a corpse and lying to Mustapha's wife and son, Dave also commits several serious moral wrongs. Assuming that what he does is indeed

[12] *Death in Brunswick* (Meridian Films, 1990). Cited by Cocking and Kennett (2000), 279.
[13] The example presented here has been changed slightly from the original. In the original, as presented by Cocking and Kennett, Carl only begs Dave not to call the police; he does not offer as an alternative that they hide Mustapha's body, etc. Dave is responsible for the alternative. The change made here to the example—Carl is responsible for devising the alternative—does not make it any less plausible as a kind of situation friends may face nor does it affect Cocking and Kennett's take on it. The change only makes the example a bit simpler for my purposes. The argument I present here would say much the same thing, in the end, about the example in its original form; the story, though, would be much more complex.

morally wrong—as it quite plausibly is—then it seems Dave does what a loyal friend ought precisely by committing what are nevertheless serious moral wrongs. What, as a loyal friend, Dave must do here is exactly what, as a moral agent, he must not do. What this case shows, they argue, is that a person may be required, for the sake of his friend and because they are friends, to commit what are, all things considered, serious moral wrongs: a person's friendship with another can lead him into 'moral danger.'[14]

On their view, Dave is forced to choose between being a loyal friend and being a morally upright agent, and he acts appropriately by choosing to be a loyal friend. I argue here that Dave does not actually face such a stark choice, and he does not because the situation in which he finds himself is not that simple. Indeed, I suggest that, even assuming that what Carl and Dave do in the *Brunswick* case is morally wrong and that Dave does act as a loyal friend by helping Carl, there is reason to think that Dave actually does the morally right thing precisely by being a loyal friend to Carl.

What is important about this case, I argue, is that Carl and Dave *disagree*, and *disagree reasonably*, about what the morally right thing to do is: Dave thinks they must call the police, while Carl thinks it permissible to hide Mustapha's body.[15] Because they face a situation of reasonable moral

[14] Cocking and Kennett (2000), 296.

[15] Cocking and Kennett's own argument, I think, depends on the claim that both views—that the police must be called or that the body may permissibly be hidden—are reasonable, for, if it were clearly wrong for Carl and Dave to hide Mustapha's body, it would be difficult to say, as they do, that helping Carl hide Mustapha's body promotes Carl's well-being and so is the appropriate action of a loyal friend. If it were clear that this course of action were seriously wrong—if no reasonable person could think it morally permissible—it seems quite plausible that Dave, as Carl's friend, would be required out of concern for Carl's well-being to *refuse* to help him and instead to try to steer him away from it. Contrary to what some might think, this sort of thought does not require a thoroughly moralized conception of individual well-being whereby there can be no conflict between well-being and morality. It requires only a moderately moralized one whereby serious moral wrongs cannot contribute to a person's well-being. And a plausible conception of well-being, I think, must be at least moderately moralized. And so, because they claim that Dave promotes Carl's well-being by helping him

disagreement between them, Dave and Carl face not only the question of what they are to do, but also the question of *who is to decide* what they are to do. While Dave's duty as a friend to care for Carl bears on the former question by giving Dave important reasons to help Carl, it also bears on the latter question. And this latter question—who is to decide what they are to do—is itself, I suggest, a moral question, for Dave's care for Carl as a friend must be care for him as a free person if it is to be compatible with the right sort of respect for Carl. Because Dave must care for Carl as a free person, Dave's duty of care for him is, in this situation, a duty to defer to him about what they are to do. And so, while Dave may be sure what he would do *were it up to him*, it is *not* up to him. It is up to Carl.

My suggestion is that, by deferring to Carl in the *Brunswick* case, Dave does not simply act as a loyal friend should; he does the morally right thing by doing so. The care for Carl that such deference expresses—care for him as a free person—seems the kind of care appropriate of friends because it is care that also shows proper respect for the other. Indeed, it is in part because friends care for each other as free persons that close friendship is a morally valuable sort of relationship.[16] And this is clearest, I think, in a case of reasonable moral disagreement between friends: By deferring to Carl, Dave enables him to exercise his moral agency responsibly in a situation that is

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remove the body, Cocking and Kennett's take on the case, if it is to be plausible, requires the assumption that it is at least reasonable to think it permissible to hide Mustapha's body.

[16] My point here is connected to T.M. Scanlon's claim that "friendship… requires us to recognize our friends as having moral standing as persons" (Scanlon (1998), 165). Scanlon is concerned to show that our conception of friendship already includes moral limits on what we may do for our friends. (His example is of a friend who expresses his willingness to steal a kidney for you. By doing so, your friend reveals that whether he sees you as having moral standing depends on whether he happens to like you, and this sort of attitude is incompatible with genuine friendship.) I am concerned here to show that recognizing your friend as someone with moral standing will also affect the way in which you care for her as a friend: your care for her will be care for her as a free person.

especially significant for him. And, by enabling him to exercise his moral agency here out of care for him as a friend whose moral agency merits respect, Dave treats him not only as a friend but also as a fellow moral agent.

At the end, I argue that a duty to defer will be a constitutive duty not merely of friendship but of all those non-instrumentally valuable relationships defined in part by a mutual aspiration to respect one another's freedom, including, as I will argue in the next chapter, co-citizenship in a democratic community of free and equal citizens. And so, the explanation for why friends have this duty and why this duty is consistent with their freedom illustrates how one might respond to the conscience objection to the duty to uphold the law of a democratic community: In this sort of political community, the citizen who reasonably disagrees with some law can recognize upholding that law as a constitutive duty of her valuable relationship of co-citizenship in a democratic community pursuing just governance by law. And so, upholding the law, which is required of her as a democratic citizen, is compatible with her freedom because it is an expression of it.

1. Friendship and Deference: Some Illustrative Cases

Before addressing the question of reasonable moral disagreement directly, I develop an account of the duty to defer as a constitutive duty of friendship by considering cases where friends disagree but where their disagreements are not moral disagreements. The case for a duty to defer is more straightforward when the friends' disagreements are not moral ones, for all we need consider are the friendship itself and the interests of the friends. And, it is only once we mount a successful defense of the duty to defer in these cases that we need even worry about any added complexity that *moral*

disagreement might bring.

1.1 The central case: Friend's Breakup

Consider the following case of a disagreement between two close friends, which I will call *Friend's Breakup*:

> One morning, my good friend Clara (who lives a two-hour drive away in Boston) calls very distraught over the sudden demise of a long and serious romantic relationship. I'm someone in whom she confides about such things, and I know a great deal about the couple's history and her experiences in the relationship. She says, "I know it's a long drive. But you've got to come; there's no one else here for me. I need you." Now, I don't have any important plans or urgent deadlines on the horizon, but she does not really need me: their relationship had been deteriorating for some time—she and I had both seen the signs—and she'll apologize later for asking me to come. ("I overreacted," she'll say.) Still, she thinks that she needs me and that I, as her friend, should go to her.[17]

It seems to me that, in an important sense, the decision whether to go to Boston is not really mine to make but rather Clara's. Of course, the *final* decision about going is mine. But this final decision is special, for my friendship with Clara gives me a duty here to defer to her judgment that I should go to Boston. My decision concerns whether other considerations defeat her claim—which, as her friend, I must accept—that I am to go.[18] And, I should judge that none does.[19] I ought to go to Boston, not because I agree with Clara's judgment (in fact, I do not), but because she judges that she needs

[17] This situation is a slightly modified version of one in which I found myself with a very good friend a few years ago. It was that situation that prompted me to think about whether friends have duties to defer to each other.

[18] My decision, then, is a substantive one: this duty to defer is still only a *prima facie* duty—the reason provided by the fact of Clara's judgment is only presumptively conclusive—and so it may be overridden by other considerations.

[19] As stipulated, I have no important plans or urgent deadlines that compete with Clara's claim. There is, then, nothing that defeats her claim here.

me and, as her friend, I must defer to her about this.[20]

Why think that I must defer to Clara here? Suppose that Clara does not have this power to make a judgment to which I must defer, say, because her having it is incompatible with my autonomy or with the equality that exists between friends. Suppose instead that all Clara does is inform me of her view of the matter. If so, I should decide here that I need not go to Boston—Clara does not need me, her disappointment will be short-lived, and I can fulfill my duty of care in other ways—and I should say something like, "Sorry, Clara, I'm not going to come to Boston, for I just don't think I must. But let's keep talking over the phone; I want to be there for you."[21] The problem here is that my refusal to go—even one based on a correct judgment of the reasons—sits uneasily with my expression of care for Clara. Indeed, by presuming that I have the right to judge *how* I care for Clara, I actually fail to care properly for her by failing to recognize that she has much more at stake here than I do. Because she has more at stake, showing proper care requires allowing *her* to judge how I care for her here. And to allow her to do this is to defer to her.

Granted, deferring to Clara here, though burdensome, does not require sacrificing any important projects of mine. And someone might object that, since not much is at stake for me, Friend's Breakup shows at best that this duty, though genuine, is only a weak one. When deferring requires sacrifice, the objection continues, I do not have such a duty but will instead retain the

[20] Since the final decision is mine to make, and since I may appropriately deliberate about what final decision to make, the sort of deference that I am concerned with here is not the same as the uncritical or self-abnegating deference that Andrea Westlund finds to be incompatible with autonomy in her "Selflessness and Responsibility for Self" (2003).
[21] Of course, this is not to say that Clara's informing me of her view would be idle here. By informing me of it, she would make clear to me her disappointment were I to decide not to go and, insofar as I have reason to think her judgment might be correct, she would likely prompt me to look for reasons to go that I might have missed.

right to decide myself.[22]

1.2 Two further cases: Untimely Breakup 1 and 2

This objection is mistaken: I may have a duty to defer, even when deferring requires sacrifice. Consider two new cases of disagreement between friends (*Untimely Breakup 1 & 2*):

> The situations remain much the same as in Friend's Breakup, except that, in 1, one of my favorite authors is giving a rare public reading the next day, while, in 2, I have my graduate-school qualifying exams the next week. In each case, Clara knows about my plans. When she calls, she tells me:
>
> > *1*: "I know that author is reading tomorrow. But I really need you to come; there's no one else here for me. I feel bad asking this of you, but I need you here."
> >
> > *2*: "I know you have your Q-exams coming up, so it's up to you. But I really need you to come; there's no one else here for me. I'd really love it if you'd come, but I'll understand if you can't."
>
> In both versions, she does not need me, and she'll apologize later for asking me to come over.

I must defer to Clara in Untimely Breakup 1, but, it seems to me, I need not in 2. And what Clara says in each reveals that she herself recognizes this. But, importantly, what she recognizes in Untimely Breakup 2 is not simply that I need not defer to her but that she must defer to me.

In Untimely Breakup 1, Clara says what she says in Friend's Breakup, while also acknowledging the sacrifice I must make. Even with this sacrifice, I would still fail to be a good friend were I to refuse to go, saying, "Sorry, Clara, I'm not going to come to Boston, for I just don't think I must. But let's keep talking over the phone; I want to be there for you." It remains the case that,

[22] For this objection I am indebted to Sara Streett.

because Clara has more at stake here than I do, proper care for her requires allowing her to judge how I care for her here, even at the cost of attending the reading.

In Untimely Breakup 2, Clara denies having the power here to make a judgment to which I must defer ("It's up to you," she says.). By respecting my interest in exercising choice, she shows that she cares for me as a free (or, self-determining) person. But she also shows proper care for me as a free person by being prepared to accept my decision—to go or not—as consistent with proper care for her, whether or not she agrees with it ("I'll understand if you can't," she says.). In Untimely Breakup 2, then, Clara recognizes that the decision is mine and so that she is to defer to me, while, in Untimely Breakup 1, she recognizes that the decision is hers and so that I'm to defer to her.[23] What happens when Clara and I both have something important at stake is not, as the objection supposes, that there is no longer a question of deference, but rather that we confront the hard question of which one is to defer to the other.

These sorts of situations, I think, are not unusual.[24] What they reveal is that a friend can have a duty to defer to the other because (a) the other has reason to want to make the decision herself and (b) he, as her friend, has reason to allow her to do that by deferring to her decision, even one with

[23] That Clara responds appropriately in each situation is itself important, for, as my account will make clear, a friend's duty of care gives him a duty to defer in a particular situation only if his friend reciprocates that care, that is, only if she would willingly defer to him were their positions switched. And so, part of why I must defer to Clara in Untimely Breakup 1 is that, were we in Untimely Breakup 2, Clara would recognize that she must defer to me.

[24] Though how frequently an individual encounters them depends, in part, on her and her friend's wealth and class: the wealthier she and her friends are, it seems, the less she is likely to need to rely on her friends for help beyond emotional support (and they on her), for she has the means to pursue her own projects, etc., independently (and her friends theirs). Of course, whether this increased independence is a good thing is an open question. I thank Vincent Baltazar for discussion on these issues.

which he disagrees.[25] And he has reason to defer to her because, by allowing her that choice, he enables her to be self-determining and thereby respects her as a free person.

1.3 Freedom and the value of choice

In these Breakup cases, Clara and I both have various reasons to want the choice of what I'm to do to be either hers or mine.[26] In other words, not only do we each have an interest in what decision is made, we also have an interest in who makes it. In order to separate out these various reasons, consider briefly how exercising choice can be valuable for a person.[27] Of course, exercising choice can and often does have instrumental value: because I am normally more informed than others about what is better for me, what is chosen is more likely to serve my interests when I do the choosing.[28] But exercising choice can also have non-instrumental value. T.M. Scanlon, for instance, distinguishes two kinds of non-instrumental value choice can have

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[25] Like duties of gratitude, a friend cannot demand deference from the other—even when such deference is required—without that demand itself corrupting the situation. When a person demands the gratitude that another owes her, that demand makes it the case that the genuineness of any expressions of 'gratitude' on his part will be suspect: do they express genuine gratitude on his part or are they only offered to satisfy her demand? The same seems true of duties to defer. By demanding the deference the other owes her, a friend transforms the situation in such that she cannot trust that his 'deference' stems from genuine care for her rather than simply being done to satisfy her demand. Of course, to say that this duty to defer is not a duty that one can normally demand be fulfilled is not to admit that it is not really a duty.

[26] Or, more precisely, the choice of what the friendship requires of me, since my duties of friendship are only prima facie and so overridable by other duties I might have.

[27] Exercising choice here includes, say, making the determination of what a duty actually requires in a situation. Being the one to make this sort of determination can be valuable, in part, because people reasoning in good faith may reasonably disagree about what a duty requires in a situation. I examine these issues in detail at the end when discussing the *Death in Brunswick* case.

[28] Of course, when I'm not, allowing another to choose for me may be more instrumentally valuable. Scanlon's example is of ordering food in a restaurant: under normal circumstances, I am more likely to eat food I enjoy if I am the one who picks it; however, if I am drunk or at a particularly exotic restaurant, I may be more likely to get food I enjoy by letting a knowledgeable friend choose for me (Scanlon (1998), 251).

that are relevant for my discussion: representative and symbolic.[29]

Exercising choice has representative value when we have reason to want our actions to reflect our own tastes, values, imagination, commitments, etc., for they can often only reflect those things when they depend on our choices.[30] To adapt Scanlon's example, I have reason to choose an anniversary gift for my partner myself, even if his ex would actually choose a better gift for me to give.[31] Importantly, *not* exercising choice can also have representative value. For instance, if your sibling has bid for a contract with the state agency at which you work, you have reason to want not to make the decision about whether she gets it. And exercising choice has symbolic value when we have reason to exercise choice in a situation because of what doing so says about us as agents.[32] Consider choosing a college major: not only do students have representative reason to value choosing their own majors but also symbolic reason, for having their parents or a professor choose for them would imply that they are not yet competent or independent adults.[33]

What is important here is that exercising choice often has non-instrumental value, for our friends often know as well as (and sometimes

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[29] See Scanlon (1998), 251-256.
[30] The exercise of choice has representative value, Scanlon explains, when we have "reasons… for wanting to see features of ourselves manifested in actions" (Scanlon (1998), 252).
[31] Similarly, I have representative reason not to give him cash as a gift. To do so would be, in effect, to allow him to choose his own gift.
[32] As Scanlon puts it, "In a situation in which people are normally expected to make choices of a certain sort for themselves, individuals have reason to value the opportunity to make these choices because not having or not exercising this opportunity would be seen as reflecting a judgment (their own or someone else's) that they are not competent or do not have the standing normally accorded an adult member of society." (Scanlon (1998), 253)
[33] And so, they have reason to choose themselves even if their parents would, in fact, choose a major that is better for them. Many students whose parents insist on choosing their major for them are often unconcerned about who would make the better choice and often concerned about the ability to manifest their own cares, values and commitments by choosing their major mainly because having this ability is symbolic of being an adult, and that seems because the choice of a major has this larger symbolic value for them.

better than) we do what is good for us.[34] Indeed, were instrumental value all, what I should do in the Breakup cases would be obvious: I should refuse (nicely) to go to Boston. But it is not at all obvious, and that is because Clara and I both have various non-instrumental reasons for wanting to exercise choice.

a. Friend's Breakup

Consider why deciding herself whether I am to come to Boston is valuable for Clara. Her long-term romantic relationship has ended suddenly. Presumably, one important reason for her distress is her lack of control over what has happened: either she was dumped or, even if she ended it, her choice feels in some way forced (by him, by their interactions, by another woman). It is quite unsettling when important life-events feel as if they are simply befalling you, particularly ones you hope would depend in some way on your choices. In these circumstances, it is itself important that Clara's way of coping with her relationship's demise depend on her choices: by choosing how she will cope, she is able to experience some control over her own life. There is good reason, then, to allow her choices to determine how she copes.

Now, that there is good reason to allow Clara to choose how she copes does not, by itself, explain why I must defer. Were she to decide she needs Stephen Colbert to keep her company, Stephen would have little reason to comply. But Stephen, of course, is a stranger, and so he lacks the special duty of care towards Clara that I, as her good friend, have. And this duty of care

[34] Indeed, the sort of knowledge of and care for your friend that is characteristic of close friendship will often mean that you would choose just as well (if not better) for her than she would herself. Though this seems especially true of the sort of 'perfect' or 'complete' friendship that concerns both Aristotle and Montaigne, it will often be true also of the close friendships that concern me here.

gives me reason to want how she copes not to depend on *my* choices, for I must give her needs, as determined by her particular identity, projects, commitments, and history, special importance in my deliberations, including her need to have her choices determine how she copes.[35] Were I to refuse to defer, I would fail to give this need that special importance. Deferring, then, has representative value because it shows that I care for Clara in the right way. I must defer to her precisely because I am her friend.

b. Untimely Breakup

Now, what about Untimely Breakup 1 and 2? Clara has the same reasons she does in Friend's Breakup for deciding herself how she copes, and I have the same reasons of friendship for deferring. But, because I also have something at stake in each, there are additional reasons to take into account.

In Untimely Breakup 1, that I have something at stake—the reading by my favorite author—actually gives me symbolic reason *to* defer: should I not, my refusal will suggest that I think Clara's judgment that I ought to go to Boston even though I'd miss the reading not motivated by proper care for me.[36] Of course, that I have something at stake gives me representative reason to want the decision to be mine: my choice to attend would express the depth of my 'fanship' of the author and of my appreciation of literature. But since my reasons for expressing fanship pale in comparison to Clara's reasons for choosing how she copes, I have much less reason to want the decision to be mine than I have to want it to be Clara's. In Untimely Breakup 1, then, I ought to allow her to exercise choice by deferring to her.

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[35] For discussion of care and particularity, see Friedman (1993), 188-195.
[36] My refusal, then, would suggest that I don't think she is being a good friend to me, for she can be motivated by the proper sort of care for me—and so can be a good friend to me—and still disagree with me about what to do.

But Untimely Breakup 2 concerns my career, and there is great value—representative and symbolic—in having my career path depend on my own choices.[37] But whether the decision about going to Boston is mine depends on the nature of our particular friendship. In general, among the terms of a friendship (to speak legalistically of its 'terms') are mutually understood, even if unspoken, exception clauses: you can rely on me to support you as a friend so long as doing so doesn't require sacrificing things *x*, *y* and *z*.[38] In this instance, my career-related choices are excluded by our friendship's exception clause, as Clara recognizes when she says that the decision is mine: she leaves it to me to determine the strength of my reasons for studying compared to my reasons as her friend to go to her.[39] And so, I may refuse to defer here without suggesting that Clara's judgment is not motivated by proper care for me, because whether it is does not matter, it is not her decision but mine. As my decision, it will simply mean that I disagree with Clara.[40] Now, Clara may appropriately feel disappointed by my decision,

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[37] Since one's career is typically a defining part of one's life, it should reflect one's own particular aspirations, goals and values. These include, for instance, which skills and aptitudes one values and wants to develop, which challenges one wants to face, and what relationships—spousal, parental, etc.—one wants to form and deepen.

[38] It is important to note, though, that the exception clause does not state that I will never sacrifice *x*, *y* or *z* for my friend's sake, only that I am the one who gets to determine whether I will, and this fact—that it is up to me—is why the friend does not have the right to *rely* on my sacrificing these things.

[39] As a rule, the less the clause excludes, the more intimate the relationship is; the more it excludes, the less intimate. And this seems to be the case because the less the clause excludes, the greater the active care that obtains between the friends, while the more the clause excludes, the closer this active care comes to the basic duty of aid we owe everyone *qua* persons. Now, considering specifically a person's career path, one's spouse normally has more of a say over one's career path than a friend does—career decisions are normally excluded by a friendship's clause but not a marriage's—and this difference helps to mark the spousal relationship as generally more intimate than friendship. Of course, this is only generally true. We can imagine friendships in which the friends have some say over each other's career paths, just as we can imagine marriages—between exceptionally ambitious academics, for instance—in which the spouses have little say over them. But both sorts seem to be rare.

[40] Granted, it would be the case here that Clara thinks that our friendship is closer than I do. Though this sort of disagreement about the basic terms of our friendship—about what we

since she cannot rely on the friendship in the way she wanted. But she may not appropriately feel betrayed, since the decision was mine and, so long as I acknowledge her need, my decision is compatible with proper care for her.

1.4 A case where deference is not required: Friend's Medicine

That the duty to defer is connected in this way to the other's interest in exercising choice is important, for it also explains why deference may not be required even when the other has more at stake in the situation. Consider the following case, which I'll call *Friend's Medicine*:

> Your friend is quite ill—it is not life threatening, but it is immobilizing—and so she cannot get to the medicine cabinet herself. During a visit, she asks you to get a certain medicine for her. You know that it will not cure her of her illness (as she mistakenly thinks) but rather will worsen her condition, while another medicine in the cabinet is the appropriate one.[41]

I suspect most people will deny that you have reason to defer to your friend here by bringing her the medicine she requests. And I think they are quite correct. In Friend's Medicine, your friend has no non-instrumental reasons for valuing her exercise of choice—what medicine she takes says nothing important about her as an agent nor about what she values—and so no interest in exercising choice that competes with her interest in recovering from her illness. Indeed, her only relevant interest is in recovery. And so, her only concern should be with the medicine's efficacy at curing her illness. Since her interest in recovery is better realized by your deciding which medicine she is to take than in her deciding, you must insist that she take the medicine you choose.

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want the friendship to be—is an important kind of disagreement that raises many hard questions, it is distinct from the sort I'm concerned with here.

[41] I am indebted to Nick Sturgeon for this example and for pressing me to address it.

1.5 Preliminary results

This account of deference in friendship relies on two main claims, one about friendship and one about self-determination and choice: (1) friends care deeply for each other as free persons and they are prepared to act on that care, and (2), in some situations, a person has an interest in exercising choice separate from those interests promoted by choosing well. Deference is appropriate, I have argued, when friends disagree about what they are to do but one's interest in exercising choice is particularly at stake. And deference is required when one friend cannot show proper care for the other as a free person without promoting her interest in exercising choice by allowing her to decide what they are to do.

2. Locating the Duty to Defer within Friendship

The task now is to develop a more general account of this duty to defer by explaining why several defining features of friendship would together be impossible to sustain without also acknowledging a duty of friends to defer. What are these features? The first I have already mentioned: (a) Friends care deeply for each other for the other's sake and are prepared to act on that care.[42] The others are: (b) Friends are able to satisfy, in the friendship, an important need to disclose themselves to some others, one which they cannot satisfy in everyday social interaction.[43] (c) A substantial bond of mutual trust

[42] See, for instance, Aristotle (1999) 122; Friedman (1993), 187-193; Thomas (1987), 226.
[43] See, for instance, Kant (1996), 586-587; Montaigne (2005), 3; and Thomas (1987), 223. On Kant's account, we need to disclose our views about religion and politics. On Laurence Thomas' account, we need to disclose our motives and other "intimate information" about ourselves. On my account, the need is a more general need to be honest and open about ourselves and our projects, commitments, hopes, fears, etc. Different societies will impose different constraints on persons concerning what they can and cannot be publicly honest and open about. (In contemporary America, one's views about politics and religion need not be as closely guarded as they needed to be in Kant's Prussia.) But every society will impose some such constraint and so persons will need to find certain others—who become their friends—with whom they can be free of that constraint. I take my claim about self-disclosure

binds friends.[44] (d) Friends reciprocate (and know that they both reciprocate) this care, trust and self-disclosure.[45] I take these claims about friendship to be relatively uncontroversial, and so I do not argue for them here. Instead, I argue that a relationship cannot possess these features—and so cannot be a friendship—unless the friends possess (and acknowledge) a duty sometimes to defer to each other.

2.1 Friendships without deference?[46]

Suppose that friends lack this duty to defer. In Friend's Breakup, then, I possess deliberative independence from Clara: I have the right to judge for myself what our friendship requires of me, and Clara cannot trust that her voicing of her judgment itself counts as a reason for me to act according to it.[47] Whenever she gives voice to one, then, an implicit qualification accompanies it: "The fact that this judgment is mine does not, by itself, give you any reason to do *x*, and that you are as free as before to decide whether to do *x*. I hope you agree with me about *x*-ing." Clara and I, then, will be able sometimes to deliberate and act jointly for the good of one or both of us, but only when we

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not to be what Cocking and Kennett ridicule in "Friendship and the Self" as 'the secrets view.' In fact, I take it to be compatible with their insight that "as a close friend of another, one is characteristically and distinctively receptive to being directed and interpreted and so in these ways drawn by the other" (Cocking and Kennett (1998), 503). Friends do not disclose themselves to each other as already formed selves but as selves being formed by the friendship. Thomas, whose view they take to be paradigmatic of 'the secrets view,' actually alludes to this very phenomenon. See Thomas (1987), 232.

[44] See, for instance, Thomas (1987), 224; Friedman (1993), 190; and Westlund (2005), 23.

[45] For remarks about the importance of reciprocity, see, for instance, Aristotle (1999), 123; and Thomas (1987), 225.

[46] I borrow heavily in this section from the account of promising and the role it plays in sustaining relationships offered by Seana Shiffrin in "Promising, Intimate Relationships and Conventionalism." See Shiffrin (2008), 502-507.

[47] That a friend makes (and voices) a judgment does normally give you some reason to act according to it, for the friend will normally be disappointed if you do not act according to it and you have reason to prevent her disappointment. But it is her potential disappointment that gives you this reason and this disappointment is only contingently (if regularly) connected to the fact that she's made a judgment. Michelle Kosch urged me to clarify this.

agree on the merits.[48]

Now, some relationships—business ones, say—are like this, but that seems to me because a person lacks the kind of justified trust in her associates that would justify letting her guard down. She can trust neither that they know what is in her interests nor that they care for her enough to look out for her interests.[49] Without such trust, deferring to them would make her objectionably vulnerable to being harmed by their decisions.[50] And so, she must maintain a kind of distance and independence from the others that friends need not.

In Friend's Breakup, Clara thinks my going to Boston important for her well-being; I do not think it important for mine. Without a duty to defer, then, Clara is doubly vulnerable: not only does she need me in a way that I do not need her, but whether I will meet her need is *up to me*. This latter inequality, if reiterated, will adversely affect our friendship, for Clara may react in several ways. She may come to feel powerless or frustrated and angry that my unilateral decision should prevail here, of all situations. Or, to counter this vulnerability, she may take advantage of her special knowledge of me to deceive or manipulate me into doing what she wants.[51] Such manipulation

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[48] This is not entirely true, for the friends can make promises to each other and so act jointly even when they do not agree on the merits (i.e., I may not agree now that I ought to do *x*, but, because I promised you beforehand that I would do *x*, I will still do *x*.). I discuss the role of promising in a later section.

[49] That business and other everyday relationships are like this explains, in part, why individuals often cannot safely fulfill their need for self-disclosure in everyday situations.

[50] This is not to say that her associates will intentionally try to harm her. Even if they don't intentionally take advantage her having let her guard down, she may be harmed by their decisions simply on account of their relative ignorance of or unconcern for her good. As Karen Jones argues in her "Trust as an Affective Attitude," trust in another is not simply an attitude of "optimism" about that other's goodwill but also such an attitude about her competence. See Jones (1996), 6-7. For a similar point, see Annette Baier's "Trust and Antitrust" (1986), 239.

[51] Notice also that going this route is a way for her to experience some control, even if she'll find it ultimately unsatisfying.

and deceit, when reiterated across a relationship, would tend to poison it.[52] She might also feel pressure to erase differences between us in order to avoid disagreement by suppressing certain of her interests, commitments and desires. Among other things, such suppression may lead her to live inauthentically. Or, if she finds it too demanding, she may be forced to abandon the friendship.[53]

Were friends to resist these pressures, they would still face a large task of continual persuasion of and dialogue with the other to sustain their extensive agreement. While ongoing and open dialogue is certainly necessary for healthy friendships, the requirement that both agree on the merits before acting together would often prevent them from acting together at crucial times.[54] And a friend would often be unable to rely on the other's help, for she would need to rely not just on his willingness to help but also on his agreeing that the particular help she wants is appropriate. Such confident reliance would be extremely hard to come by.

2.2 Friendships and promising

Someone might object that denying the duty of friends to defer is not as problematic as I have urged, for friends can manage these problems by using

[52] It would poison it particularly because both persons will realize that the other likely feels the same pressures towards manipulation.
[53] As Michelle Kosch has pointed out to me, even with a duty to sometimes to defer, friendships will still be vulnerable to these sorts of problems. (Indeed, friends may sometimes be tempted to mislead the other into thinking that some situation is a deference-requiring one.) All intimate relationships, I think, are somewhat vulnerable to these problems insofar as they include the mutual aspiration to respect one another as free persons; this vulnerability, then, is unavoidable. But it seems to me that, without a duty to defer, these problems would be so acute that the relations of mutual trust and care constitutive of close friendships would be impossible to sustain. It is only with such a duty, then, that friendships can flourish.
[54] In a later section, I discuss one important reason why ongoing dialogue is necessary for friendships to succeed.

their power to make binding promises.[55] There is, I admit, some truth to this objection: the power to promise is valuable, in part, because it enables friends to some extent to avoid these problems. However, the reasons why friends must have the power to promise also explain why they must have a broader duty to defer.

We can understand promising as undertaking a duty to defer: By making a promise to another, the promisor voluntarily and knowingly transfers her right to deliberate over and decide about some sphere of practical reasons to the promisee.[56] For instance, if I promise to give you $20 next week, I thereby transfer over to you the right to decide next week whether I'm to give it to you, for you can either hold me to or release me from the promise. In this way, promising to give you $20, I undertake a duty to defer to you next week about whether I'm to give you $20.[57] And, as Seana Shiffrin argues, friends must have the power to exchange promises if they are to maintain a healthy friendship.[58] The exercise of this power, she argues, enables friends to remedy situations where they are unequally situated in the way Clara and I are in Friend's Breakup: by promising, the less vulnerable friend equalizes their standing by giving the more vulnerable friend the right to decide for them both. As Shiffrin puts it, "[p]romises often involve the solicitation of trust in situations in which there is a local imbalance of power or vulnerability or the potential for this to develop," and this solicitation is

[55] Seana Shiffrin has emphasized that, because promises can play this role, the power to promise is an especially valuable one for individuals to have at their disposal. See Shiffrin (2008).
[56] Philip Soper offers a similar analysis of promises. See Soper (2002), 136-7.
[57] That a promise can be understood as undertaking a duty to defer to the promissee marks one important difference between a promise and a vow: I might vow to give you $20 next week but, unlike a promise, you do not have the right to hold me to or release me from my vow.
[58] Shiffrin (2008), 498-499.

done "through a representation that certain opportunities to exploit the imbalance or vulnerability, to leave someone vulnerable, or to allow the hazards of vulnerability to unfold will be forsworn."[59] By making the appropriate promise to my friend concerning a situation where she is particularly vulnerable, I give her the right to rely on me, thereby showing her that I am on her side. And by exchanging such promises, we are able to avoid those problems of anger, manipulation and suppression of interests that would threaten the mutual care and trust between us.

Suppose in Friend's Breakup that I had promised Clara that, should her relationship end, I would be there for her in whatever way she needed. By promising this, I not only assured her of my support but also made clear my care for her. Indeed, my promising is itself an important expression of care, for it reveals that I am aware of and concerned about her predictable vulnerability. But it is not the case that Clara has the right to rely on me to be there for her only because of my promise, for our ties of friendship already justify such reliance. Rather than create this right, then, my promise emphasizes her already existing right by overdetermining it, thereby underscoring my care for Clara.

These ties already justify such reliance because potential friends' exchanges of promises would be unable by themselves to cultivate the mutual trust and care that defines friendship. Friendships are ongoing relationships in which neither the vulnerabilities the friends will come to have nor the nature of their interactions are always foreseeable or manageable. But the value for a person of exercising choice in a situation is a value her friend must always be willing to respect and respond to, for such willingness expresses

[59] Shiffrin (2008), 518-519.

proper care for her. And so, for a friend to defer only when that deference is preceded by a promise is for him to insist that the value of his control over his life—of exercising choice here—always overrides the value for his friend of her control over her life. The same concerns, then, that motivate Shiffrin's account of promising in intimate relationships motivate a similar account of the duty to defer.

2.3 The interrelatedness of mutual trust, care and self-disclosure

The main argument for this duty to defer is that, unless friends recognize this duty to defer, they will be unable to realize in their interactions the care and trust that are constitutive features of friendship.[60] And so, the duty to defer is a constitutive duty of friendship: we cannot specify what it takes to show proper care for and trust in a friend without including as a duty of friendship the duty to defer.

In Friend's Breakup, my deferring to Clara expresses both my trust in and care for her. It expresses my trust in her as my friend: by deferring, I hand part of my agency over to her (in a limited way) for her to do with what she thinks best, and my willingness to do so shows her that I trust that she will think, not only of herself, but also of me, and so choose what she thinks best for us both.[61] It also expresses my care for her by satisfying an important need

[60] You might think the case for a duty to defer should focus on how the mutual trust between friends protects the deferring friend from being exploited by the other, since deference makes one vulnerable to exploitation. Though this exploitation worry is relevant, avoiding such exploitation cannot be even the main story to be told about mutual trust and deference, for what it shows is that the mutual trust between friends in part explains why such deference would be justifiable, not why friends might have a duty to defer. I thank Dick Miller for discussion on this point.

[61] Of course, I may not be aware that, by deferring to Clara, I express my trust in her or even that I am willing to defer to her, in part, because I trust her and her good will. As Annette Baier notes in her "Trust and Antitrust," this sort of trust is normally unself-conscious. As she says, "The ultimate point of what we are doing when we trust may be the last thing we come to realize" (Baier (1986), 236).

she has—here, to have how she copes depend on her choices—a need to which I ought to be specially responsive simply because it is hers. Were I to refuse to defer to Clara, I would be holding myself back from her as a way to guard myself; but, because doing so is unnecessary in the context of the mutual trust between us, it is incompatible with proper care for her.

My care for and trust in her—as expressed by my willingness to defer—are justified, in part, because she is willing to defer in similar situations and this reciprocated willingness expresses her care for and trust in me. Were Clara unwilling to reciprocate this deference, I would have reason to doubt both that she trusts me, since she is holding herself back, and that she cares for me in the right way, since she is unwilling to give my interest in the valuable exercise of choice the special importance that I give to hers.[62] And these doubts would appropriately call into question my trust in her and in her care for me and so would call into question the appropriateness of my deferring to her.[63]

This mutual trust and care are required if friends are to create space for mutual self-disclosure. Creating such space is partly constitutive of the value of friendship, for it provides an arena in which persons can relate to one another openly and authentically.[64] Relating to another in this way is important for various reasons: we develop a genuine kinship with another; we experience an important sort of recognition; we gain new and perceptive

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[62] Thomas notes that a failure of friends to reciprocate indicates a lack of trust between them. See Thomas (1987), 225.

[63] These doubts call it into question not because I should worry that she'll intentionally take advantage of my friendship, only that she may not think also of me and my interests.

[64] I do not intend this paragraph to offer an answer to the question "Why be a good and loyal friend?" If it were offering an answer, the answer would be plainly unsatisfactory, for someone who tried to be a good and loyal friend for these reasons—that is, in order to get these benefits of friendship—would not actually be a good and loyal friend, for she would be doing it for the wrong reasons. I intend this paragraph instead to explain, in part, why friendship is something valuable in itself. For this distinction, see Scanlon (1998), 161-162.

perspectives on ourselves; and, more straightforwardly, we let our guard down.[65] Since mutual trust and mutual care together create this space for self-disclosure, and since deferring to one's friend is sometimes required to express this care for and trust in her, the duty to defer is a constitutive duty of friendship.[66]

3. OBJECTIONS

This account of the duty to defer might seem vulnerable to several objections. I address two important ones here. The first asserts that deferring to a friend whose judgment is mistaken is actually to *fail* to care for her in the right way. Proper care for a friend requires promoting her good. Because deferring to her when she is mistaken helps her act against her good, proper care for her requires *refusing* to defer. The second asserts that having this duty to defer would be to lack the right to deliberate for oneself about what one is to do, and this right is a necessary part of freedom. Since free persons can only be friends if one can care properly for one's friend while remaining free oneself, this duty to defer cannot be a duty of friendship.

3.1 Deference and proper care

In Friend's Breakup, I think Clara's judgment mistaken and yet, on my account, I have a duty to defer to her judgment. And I have it because deferring is required if I am to care for her properly as a free person. The first

[65] See, in particular, Kant's discussion of the connection between friendship and self-disclosure. Kant (1996), 586-587.
[66] Though, of course, a duty whose specification will vary according to the particular terms of the individual friendship. What this duty actually requires of a friend, then, will depend quite a bit on the particular nature of the friendship in question. In her "Friendship, Choice and Change," Marilyn Friedman emphasizes the extent to which the nature of a particular friendship is up to the friends themselves, and she argues persuasively that the distinctive value of the relationship of friendship derives, in part, from its voluntary nature. See Friedman (1993), 208-221.

objection claims that my deference actually fails to care properly for her, for I should try to prevent her from making decisions that go against her good. Clara judges that I should go to Boston for her; however, she does not actually need me to and going is burdensome for me. If the decision is hers, she will take unnecessary advantage of my care for her and thereby fail to be a good friend. By deferring to her—by making the decision hers—I help her act against her good, for she can only fail to be a good friend here with my help. As her friend, I must refuse to help her.

This objection is stronger when Clara's mistake concerns a more important interest. Suppose she decides to pursue a soulless job in high-finance because she has become enchanted by the sort of 'glamorous' urban life promoted by glossy adverts for sleek Manhattan condo towers.[67] Clearly, this sort of job, undertaken for these reasons, will not promote her good. Instead of helping her achieve this goal, the objection goes, I must try to turn her away from it, even if she disagrees with me. A true friend does not help his friend on some path away from her good simply because she has chosen that path; rather, a true friend points out her error to her, refusing to abet it, out of his care for her.[68]

Though rightly cautioning against an extreme of deference, this objection goes too far in the other direction. A person has many interests, from interests in food, shelter and security to interests in varied work, rewarding relationships and leisure time, all of which are promoted by making wise decisions. And a good friend rightly cares that his friend makes

[67] Admittedly this sort of case is less likely now after the recent financial industry debacle.
[68] This objection is suggested by Aristotle's remark in the *Nicomachean Ethics* that character-friends "neither request nor provide assistance that requires base actions, but, you might even say, prevent this. For it is proper to good people to avoid error themselves and not to permit it in their friends" (Aristotle (1999), 128).

wise decisions. When she does not, he will rightly voice his misgivings and sometimes even refuse his help. Communicating one's misgivings to a friend about her goals almost always expresses proper care, for she has an interest in recognizing that pursuing them does not promote her interests. My account of the duty to defer requires such dialogue as a part of the justification of the duty, for it is necessary for the development of the mutual care and trust that defines friendship. To this extent, then, the objection is right that proper care for a friend includes helping her make wise choices.[69]

But because a person also has an interest in exercising choice separate from her interests promoted by choosing wisely, what proper care requires of a friend when he disagrees with her choices becomes a more complex problem: promoting this interest by deferring to her may, at times, also count as helping her make unwise choices. Whether the friend's duty of care gives him a duty to defer in a case, then, depends on the circumstances: the value for her of exercising choice, her other interests at stake, the wisdom of her actual choices. In this way, the question is not, as the objection has it, whether to promote her good *or* defer to her; the question instead concerns what the appropriate way is, in the circumstances, to promote her good. And the answer will sometimes be, as it is in Friend's Breakup, to defer to her unwise choice.

3.2 Deference and freedom

On this account, I have a duty in Friend's Breakup to defer to Clara because of my duty of friendship to care for her as a free person. The second

[69] Communicating one's misgivings about a friend's choices and even refusing at times to help her, then, are things that friends do because they are friends. They are among the constitutive duties of friendship. Montaigne takes the giving of "counsels and admonitions" to be "one of the principle obligations of friendship" (Montaigne (2005), 3).

objection claims that my duty of care cannot ground a duty to defer, for deferring to her is incompatible with my freedom. A free person, the thought goes, possesses the right to deliberate and decide for himself what to do in a situation, and to have a duty to defer would be to lack that right.[70] Were it the case that being friends requires having this duty to defer, free persons could not be friends, and this seems quite implausible. The duty to defer, then, cannot be a duty of friendship because it is incompatible with freedom.

This objection fails to see that the context of the friendship makes the duty compatible with the friends' freedom. Lacking the right to deliberate for oneself is often a significant loss of control, for one is unable to tailor one's actions to suit one's own commitments and projects. And, because this sort of control often has not only instrumental but also representative and symbolic value, the right to deliberate for oneself is a crucial component of freedom. Whether such control *is* valuable in these ways depends on the situation, for in situations such as Friend's Breakup, it is not and so is not a component of one's freedom. Persons can be friends with others—and so possess a duty in certain situations to defer to them—while remaining free persons, for they will still possess the right to deliberate in those situations where it is valuable.

My giving Clara's interest in exercising choice special importance in my deliberations is required by our friendship only because she gives my interests, including my interest in exercising choice, a similar importance in her own deliberations.[71] My duty to defer, then, is compatible with my freedom in part because the deference is to someone who cares about me: the

[70] This thought is powerfully articulated by Robert Paul Wolff in his *In Defense of Anarchism* (1998). For discussions of Wolff's view, including defenses of its importance, see Green (1988), 23-62, and Shapiro (2002), 383-395.

[71] That I care for Clara as a free person, then, does not require that I care any less about myself as a free person. Indeed, my care for her is only justified and so only counts as the kind of care constitutive of friendship if I care for her, in part, as someone who cares for me.

instrumental value that the right to deliberate for oneself has in protecting and promoting one's interests is provided here by the character of the relationship. And Clara manifests her care for me, in part, by holding herself specially answerable to me because we are friends. As Andrea Westlund notes, friends "see themselves as forming a *we* in an ongoing, open-ended way, and not merely for discretely specifiable purposes upon whose achievement the *we* would dissolve."[72] And the friends define and maintain this 'we' by ongoing mutual deliberation in which they hold themselves answerable to each other for (certain of) their actions, commitments, etc.[73] In Friend's Breakup, then, I can rightly hold Clara answerable later for her judgment that she needed me; and, because we are friends, she will hold herself answerable to me: she will try to justify her judgment and, if she cannot, will admit her mistake.

Because friends are answerable to each other, even after the fact, much of the risk in lacking the right to deliberate for oneself is mitigated: the deferring friend justifiably trusts that the other's judgment is motivated by the right sorts of reasons—by care for his good as well as her own—in part because he knows (and he knows that she knows) that he may hold her answerable for it later on, post-deference.[74] No such judgment need be ultimately unanswerable in a friendship.[75]

In this way, friends can promote each other's interest in exercising

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[72] Westlund (2005), 5. Bennett Helm offers a very detailed account of the friends' shared perspective as the perspective of a plural agent of which both friends are members. See Helm (2008).

[73] Deliberation that includes the ongoing negotiation of the terms of this perspective, of which goals, ends and reasons are shared.

[74] It is hard for me to conceive of a lasting friendship in which the friends lack any real chance to engage in joint deliberation. If they always must act (and act together) on the fly, as it were, they wouldn't have the chance to come to one mind about much of anything, and this coming to one mind is crucial, I think, for any kind of meaningful shared agency.

[75] Were she to deny that she owes me a justification, I would have reason to doubt that she cares for me in the proper way—that she really is my friend—and so reason to doubt that I now have (and did have) a duty to defer to her.

choice without thereby endangering their own interests.[76] And their friendship will itself be an ongoing achievement that they have reason to value. But to value it properly just is to possess the commitment to being a good friend, including the commitment to fulfilling the duties of friendship. When I defer to Clara as our friendship requires, I express a commitment to our friendship that is genuinely mine. Granted, because I would not have gone to Boston were it up to me, my actions in Friend's Breakup are not expressive of my cares and commitments in the way they would have been were the decision mine.[77] But, because my actions are expressive of my basic commitment to her as my friend, a commitment that endures even in the circumstances of disagreement, my deference in Friend's Breakup properly counts not as an abdication of my freedom but rather as an expression of it.[78]

4. Deference and Moral Disagreement

The disagreement Clara and I face in Friend's Breakup is not a moral disagreement, but rather simply a disagreement about whether she needs me

[76] This is not entirely true, for, even if your friend is motivated by the right reasons, she may nevertheless make mistakes. And so her judgment to which you, as her friend, must defer may be mistaken. (Both Friend's Breakup and Untimely Breakup 1 are examples.) This risk of mistakes, however, simply comes along with friendship (or any such relationship) if it is to be a relationship in which each friend's interest in exercising choice is respected. And this sort of risk is the same as the risk a person assumes when she insists that her own interest in exercising choice be respected, for she may make mistakes that, had another chosen for her, could have been avoided.

[77] Among my cares and commitments are the cares and commitments that we share as friends. For discussion of what goes into such sharing of cares and commitments, see Helm (2008).

[78] Someone might object that, though this is all well and good for the friend who actually has this commitment, the response does not work in the case of the friend who lacks it. But it is a mistake to argue, as this objection does, that a friend who lacks the commitment to being a good friend—a commitment that, because she is a friend, she *ought* to have—thereby has a freedom-based complaint against the duty sometimes to defer to her friend. The problem here lies not with the duty, but with her will. It is not a distortion of the notion of freedom to say that a person's duties arising out of her valuable relationships are compatible with her freedom, even if she wrongly lacks the right kind of commitment to those relationships, for they are nonetheless *her* relationships. The choice either to be or to refuse (permissibly) to be committed to one's valuable relationships is simply not a choice that persons have reason to value.

to come to Boston. And, as I have argued, I ought to defer to Clara in these circumstances of disagreement because we are friends. The disagreement between Dave and Carl in *Death in Brunswick*, by contrast, is a moral disagreement: Dave thinks they must call the police, while Carl thinks it permissible in the circumstances to hide Mustapha's body. You might think this difference significant: because it is a moral disagreement—and a quite serious one with much at stake besides Carl's good—Dave cannot have a duty of friendship to defer to Carl. They face a serious moral question and, the thought goes, the only thing that matters is that they get the right answer and so do the morally right thing. Who decides what they are to do here depends only on who is right. Carl lacks any other reasons—representative or symbolic—to value exercising choice here, and so Dave's duty of care for Carl does not give him a duty to defer to Carl.

It seems particularly important that they get things right here because what they decide to do will deeply affect others, especially Mustapha's wife and son. However, the moral question they confront is a hard one and their disagreement about what to do seems reasonable: both positions seem plausible candidates for the correct view.[79] That their disagreement is reasonable is crucial for extending the account of the duty to defer, and so it is necessary to say a bit more about what I mean here by 'reasonable.' In his work on politics, John Rawls introduces the notion of "the burdens of judgment," and these burdens are, as he explains, "the many obstacles to the

[79] That Carl is quite likely to go to jail for a crime he did not commit is an important consideration, one that might actually outweigh the injury to Mustapha's wife and child of being lied to (assuming, of course, that there is no other way for Carl to avoid jail). That these considerations are hard to sort through seems to me why this case is one where right decision is not clear. For those who disagree, I expect that certain details can be added that would make the case a hard moral case: perhaps Carl has a severe heart condition that would go untreated by the prison's woefully inadequate medical system or perhaps he is a single father of three young children.

correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life."[80] The presence of these burdens explains how two people, both motivated by the correct concerns and judging in good faith based on the same evidence, can nevertheless arrive at different, and even opposing, judgments. Even if their judgments are not shaped by bias or irrationality, these obstacles—the complexity of the evidence, the need to weigh a variety of considerations, the necessity of interpretation—are sufficient to cause disagreements. When the sources of a disagreement lie in the burdens of judgment the deliberators face, it counts as a reasonable one, for the deliberators have done all we may expect of them as human deliberators.

Since human persons cannot avoid these burdens of judgment when deliberating, Rawls explains, reasonable disagreement about the good will be a permanent feature of a free culture. We need not restrict the effects of these burdens to questions of the good, for human persons cannot avoid them when reasoning about any complex moral question.[81] Reasonable disagreement about morality, then, will be a permanent feature of any relationship or circumstance that, like friendship, features free moral deliberation.

Suppose two persons together face a hard moral decision and that, when they deliberate about the right thing to do, both do what we may expect of them as human deliberators: they are motivated by the right sorts of moral concerns, they are properly sensitive to the features of the situation and to the

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[80] Rawls (2001), 35-7.

[81] In Rawls' work, the emphasis is often on the consequences the burdens of judgment have for our judgments of the good. As Jeremy Waldron argues in "Rawls' *Political Liberalism*," though, there seems no reason not to take the burdens of judgment to have similar consequences for our judgments about justice (and morality). See Waldron (1999), 153. Though Rawls' emphasis is often on questions of the good, he does seem to agree with Waldron in certain places, particularly in "The Idea of Public Reason Revisited." See Rawls (1999b), 136-138.

interests of others, they deliberate conscientiously, and they avoid bias and self-deception. Now, suppose that, because of the burdens of judgment, they disagree about the right thing to do. They now face a new situation, one of reasonable disagreement about the right thing to do, and so a new question concerning what they are to do. And this new question is itself a moral question that cannot be answered simply by saying that they should do whatever, in the initial situation, is the right thing to do. There is nothing more they as *human* deliberators can do to get closer to that answer. And, because their disagreement is reasonable—because each reasonably thinks she and not the other gets it right—one person's assertion that her view ought to win out because it gets it right will (reasonably) seem to the other as simply pure assertion, as the claim that her view is superior because she *thinks* it gets it right. From his perspective, then, her claim will amount to the assertion that her view ought to win *because it is hers*.

What is appropriate for them to do in this new situation of disagreement depends, I think, on the relationship, if any, they have with one another. If they are strangers, say, all that each need do is acknowledge the other's reasonable view, and acknowledge it as reasonable, before acting on his or her own judgment. If they are friends, by contrast, it is not so simple.

Properly valuing one's own freedom or autonomy requires, in part, valuing the responsible exercise of one's own moral agency, particularly in morally significant situations. When a person acts on his own moral determinations in such a situation, what happens—both his actions and their consequences—expresses his own moral sensibility, and so what happens counts as his in an important way, as part of his moral world that he has created. In this way, he can have representative reason to value the

responsible exercise of his moral agency. In addition, by acting on his own moral determinations, this person takes responsibility for and invites others to hold him responsible for what happens, thereby demanding recognition both as a moral agent and as a reasonable one. In this way, he can also have symbolic reason to value the responsible exercise of his moral agency. A person's interest in exercising choice, then, can extend even to moral questions.[82]

Were Dave and Carl strangers in the *Brunswick* case—Dave simply stumbles upon Carl standing over Mustapha's body—Dave would be justified, despite their reasonable disagreement, in acting on his own judgment that the police must be called because he has reason to value exercising his moral agency here. Of course, he is not alone: Carl has similar reasons. But, because Carl requires Dave's help if he is to do what he thinks morally justified, they cannot both exercise their agency fully here. And, because they are strangers, that Dave has an interest in exercising his moral agency here means that he need not help Carl if he reasonably disagrees with Carl about what is to be done. In this case, then, it is Dave's judgment that will determine what happens, rather than Carl's. But Carl has no complaint here, for Dave does not fail to respect Carl's interest in exercising his moral agency by calling the police; he merely exercises his own, and he happens to disagree with Carl.

That Dave and Carl are actually good friends in the *Brunswick* case changes the situation. But we must be clear about exactly which situation the fact of their friendship changes. That they are friends does not change the

[82] This account is similar to Raz's discussion of self-respect in "Liberating Duties" where he says, for instance, that "the self-respecting person holds that others should treat one as someone who is capable of rational responsible agency" (Raz (1989), 15).

initial situation: whether they may move Mustapha's body or must notify the police does not at all depend on whether Dave and Carl are friends. Rather, it changes the later situation created by their reasonable disagreement about the initial situation, and it changes it because of Dave's duty of care towards Carl. As Carl's friend, Dave must show proper care for Carl by giving his needs and interests special importance in his deliberations, including Carl's interest in responsibly exercising his moral agency. And this interest is especially important here, for this is an especially significant situation in Carl's life: what happens here has the potential to transform his life quite significantly. Though significant for Dave, the situation is not nearly as significant as it is for Carl, and so Dave's interest in doing what he reasonably thinks right pales in comparison to Carl's.[83] In this way, Dave has representative reason to defer to Carl here because doing so expresses the depth of his care for and his commitment to Carl.

Dave also has symbolic reason to defer to Carl, for doing so will suggest not only that he trusts that Carl's judgment is properly motivated by proper care for him but also that he thinks Carl is behaving as a responsible moral agent. It would be importantly disrespectful, I think, for Dave to insist on making the decision, despite their reasonable disagreement—and so for him to insist on calling the police—because, by doing so, he would be taking responsibility for the decision and its consequences away from Carl. Were he to do it out of concern for Carl, he would be acting paternalistically and so in a way incompatible with friendship; were he to do it out of a concern for himself and his own integrity, he would be holding himself back in a way

[83] I am assuming here that Dave does not risk going to jail were he to defer to Carl about what to do. If he would risk jail, then his interest in exercising choice here would be greater than it is.

incompatible with friendship. Either way, denying Carl the chance here to take responsibility for the situation by responsibly exercising his moral agency seems incompatible with being a genuine friend to Carl.

Notice that, because both Carl's and Dave's views are reasonable, this account of Dave's duty to defer to Carl does not depend on Carl and Dave holding the views they do. Even if their views were switched—Carl thinks calling the police required and Dave thinks hiding Mustapha's body permissible—it would remain the case that Dave ought to defer to Carl. In this case of disagreement, they ought to call the police. But this is not to say that the answer to the initial moral question of what they ought to do depends on who holds which view. It is only the answer to the later moral question—the one created by their reasonable disagreement—that depends on who holds which view.

Notice also that whether Dave has a duty to defer to Carl depends on the extent to which the situation they face is significant for Dave.[84] If, for instance, they are likely to get caught and so Dave likely to go to jail, Dave has much less reason to defer to Carl.[85] Because going to jail would significantly alter Dave's life, he, and not just Carl, would have good reason to value exercising his own moral agency. And so, were Dave to call the police, his refusal to defer would not suggest that he lacks trust in Carl's motivations nor that he thinks Carl not a responsible moral agent, for it is simply not Carl's decision to make. Carl may appropriately feel disappointed by Dave's

[84] Apart, of course, from its significance as something that is happening to Carl, who is his friend.

[85] There is an added difficulty here, though: the more risk there is to Dave, the less Carl's view that it is permissible to hide the body, etc., is reasonable, for Carl's deliberations must be informed by his special duty of care for Dave. And so, it seems that, if Dave is likely to go to jail, Carl should judge it impermissible to hide Mustapha's body, etc., because it is incompatible with proper care for Dave.

decision here, since he is unable to rely on the friendship in the way he thought permissible, but not betrayed, for Dave does not fail to care properly for Carl by acting on his own judgment.

Of course, this duty to defer to a friend's moral judgments only obtains when the relationship is already characterized by the appropriate relations of mutual care and mutual trust. Dave must give Carl's interest in exercising moral agency special importance in his deliberations only because Carl regularly gives Dave's interest in exercising moral agency, along with his other interests, that same special importance. Without this reciprocation, Dave cannot justifiably trust that Carl is not simply taking advantage of his loyalty. There is, however, an extra condition on the duty to defer when it concerns moral questions: Dave must be justified in trusting not only that Carl cares for him—and so is motivated in his choices by this care—but also that Carl is committed to acting morally—and so is motivated in his choices by this commitment. Without this latter sort of justified trust, Dave lacks sufficient reason to think that, by deferring to Carl, he is actually respecting and promoting Carl's interest in *responsibly* exercising moral agency. And it is only if Dave is respecting and promoting *this* interest by deferring that his deference seems justifiable, say, to Mustapha's wife, for it is only then that his deference counts as the action of a good and responsible friend.[86]

If we assume, as Cocking and Kennett do, that Carl is mistaken—and so that it is in fact impermissible to hide Mustapha's body—someone might

[86] Why should Mustapha's wife recognize that Dave had a duty to defer to Carl? She is someone who is engaged in relationships of love and so she sees herself as having special responsibilities towards those she loves. As Niko Kolodny has noted, to love someone is, in part, to recognize that anyone in the same sort of relationship will have the same special responsibilities towards their beloved as one has to one's own (Kolodny (2003), 153). And so, as someone who has (or once had or is capable of having) a close friend, Mustapha's mother must admit that all close friends have duties of friendship towards each other and so must admit that Dave had a duty of friendship to defer to Carl in this case.

put my claim here about Dave's actions as the claim that Dave is required to do an immoral thing. But this way of putting it is misleading. My claim is that Dave, as Carl's friend, must do *what Carl reasonably thinks ought to be done*. This claim, together with the assumption that Carl's judgment is mistaken and so hiding the body impermissible, does not result in the claim that, all things considered, Dave is required to do an all-things-considered immoral thing. What they do is wrong, all things considered, for Carl to do, but this by itself does not imply that it is also wrong for Dave to do, for the fact that Dave, as Carl's friend, has special duties towards him matters here. Granted, my account does seem to get Dave off the moral hook here, so to speak. But the reason why Dave is off the hook—he is Carl's friend—is also the reason why Carl is doubly on the moral hook: he is not only very wrong to hide Mustapha's body but also very wrong to take advantage of Dave's loyalty in the way he does.

Now, the situation that I think Dave faces in Death in Brunswick is, in many ways, structurally parallel to the situation the citizen faces at times with regard to the law: Ought I to obey this law that I think is unjust or should I refuse to do so out of my commitment to justice? The answer is a complex one, but it is not, as Cocking and Kennett's position here would suggest, that the good realized by the state or legal system is incompatible with the good of justice. It only seems to be the answer if the citizen fails to see that the question is not merely 'What should I do?' but also 'Who is to decide what I am to do?', that is, if she simply assumes that she is the one to decide.

5. Friendship and Co-citizenship

As I have suggested, this account of the duty of friends to defer to each

other can be marshaled to provide a response to the conscience objection to a duty to uphold the law. The response, in outline, is as follows: A community of free and equal citizens is an intrinsically valuable sort of community and one that justice requires we establish; the relationship of co-citizenship in such a community, then, will be a non-instrumentally valuable sort of relationship.[87] And the duties constitutive of this relationship of co-citizenship will be duties to interact with one's fellows as free and equal citizens. However, there will be reasonable disagreement among citizens about which laws to enact for this community. Given such disagreement, the community must settle on procedures for deciding upon laws, procedures that respect all as free and equal. And these procedures, as I have argued, will be democratic ones.

A citizen, then, will have a duty to abide by the results of these procedures when abiding by them is required in order for her to respect all, including those citizens with whom she disagrees, as free and equal. But respecting her fellows requires abiding by these results only so long as her fellows were motivated, in their political choices, by the ties of democratic community: it is only when their political choices are motivated by a general concern for their fellow citizens as free and equal that these choices, as the results of a democratic procedure, deserve to be upheld as the law of the community. In other words, the results of a democratic procedure are worthy of being upheld just in case the procedure is embedded in a thoroughly democratic community.

In order to develop and defend this relationship-based account of

[87] This account is similar in some ways to the one offered by Andrew Mason in his "Special Obligations to Compatriots." See Mason (1997).

political obligation, at least the following issues must be addressed: What sort of care for one's fellow citizens is robust enough partly to constitute the relationship of democratic community and yet still possible in a diverse community of free persons? What sort of trust in one's fellows is robust enough and yet still possible? How are institutions to be arranged in order to foster this sort of trust? What is the character of the joint deliberation and dialogue among citizens that is required in order for citizens to have a duty to uphold laws with which they disagree? Will this sort of community be able to acknowledge civil disobedience as sometimes a justified response to perceived injustice? Is this sort of thoroughly democratic community impossibly ideal?

I take up these questions in the next chapter. Here, I will restrict myself to addressing a more basic objection to the strategy of modeling the relationship of co-citizenship in a democratic community on friendship in order to respond to the conscience objection. Because friendship is a voluntary relationship, the objection goes, the proposed strategy cannot work: the duty of friends to defer is only compatible with individual freedom because the friendship itself is voluntary; co-citizenship, on the other hand, is not voluntary. The objection, then, grants my claim that possessing the duty of friends to defer does not injure one's freedom. But, it claims, my account of this duty depends on the voluntariness of friendship and, as my own defense of the natural duty of justice account of political obligation admits, co-citizenship is non-voluntary. And so, the objection goes, even if we may be able to reconcile an individual's duty to obey the law with her status as a free individual, we cannot do so by analogy with friendship and its duty to defer.

This objection is mistaken. Granted, friendship and co-citizenship do differ in the way it notes: friendship is a voluntary relationship and co-

citizenship is not.[88] But this difference is not important in the way the objection supposes. Notice why friendship must be voluntary. If a person were forced to be someone's friend—that is, if she were unable to avoid the friendship or unable to get out of it—she would have a legitimate complaint that she was being deprived of an important kind of authorship over her own life. Given the kind of relationship that friendship is, we have good reason to want some control over who are our friends. For instance, because I must give a potential friend's interests special importance, it is crucial that I be able to do so in ways that do not prevent me from pursuing my own important projects or from honoring other commitments I have, and I am best placed to judge whether I would be able to do so. Also, my special concern for my friend will often require that I help her pursue her various ends and projects, and so my friendship with her will suggest that I approve of or at least respect those ends and projects; since the friendship will say something about me and what I value, I have representative reasons in wanting its existence to depend on my choices. A person's control over who are her friends, then, is a kind of authorship over her life that she has reason to value, and so friendship must be voluntary in order for it to be compatible with freedom.[89]

It is not necessary, on the other hand, that co-citizenship be voluntary

[88] Friendships are voluntary relationships, but, it must be noted, only in a special way: we are always free to avoid becoming friends with a person—we can refrain from doing those things that may lead to friendship—and we are generally free to end a friendship when we want to, though doing so can be quite complicated and will take some time. Friendships are not voluntary, though, in the sense that you only have those friendships that you consciously choose to have, for you may come to discover that you already have one. The normal case of becoming friends, I think, is that a person only comes to realize she is friends with another (and has friendship duties towards him) once they already are friends. People hold themselves open as a general policy to friendships, and so they will do those things for others that may bring one about, often unthinkingly; they only realize later that they've become friends.

[89] In other words, it is a necessary condition of a friendship's compatibility with individual freedom that the relationship as a whole be voluntary. But, as I will argue, it is not a sufficient condition.

in order for it to be compatible with freedom, for the point of co-citizenship, with its constitutive duties and responsibilities, is to create a community of free and equal persons. If a person finds herself in such a community, she cannot legitimately complain that being deprived of the choice of whether to be a member (and so of whether to have its constitutive duties) deprives her of a valuable kind of authorship over her own life. To insist on such a choice would be to claim a power—the power to opt-out permissibly of membership in this society of free and equal persons—that is not a valuable power: to have it would be to have the ability permissibly to refuse to treat others as free and equal. No reasonable conception of freedom will include the right to treat other persons as not having an equal claim to freedom. And so, this person will have no reasons, particularly no freedom-based reasons, for valuing such a choice.

That the friendship itself is voluntary matters because a person's commitment to being a good friend—one that he is to act out of—must be voluntary in order to count as his commitment out of which he ought to act. That the friendship is voluntary, then, means that he cannot plead that this commitment is not really his or is not really significant. But his deference specifically is compatible with his freedom not because the friendship is voluntary but rather because that deference is required in order for him to be a good friend, which he has taken on the commitment to being. That co-citizenship is not voluntary does not matter because a person's commitment to being a good citizen in a community of free and equal persons is a commitment he *must* have. He cannot plead that this commitment is not really his simply because it is not voluntary. The difference that the objector notices, then, does not prevent the strategy from working.

6. Conclusion

This account of the duty of friends to defer to each other provides a way of affirming the insight about friendship contained in the joke, 'A friend will help you move house, but a good friend will help you move a body,' without thereby being forced into the view that friendship has an inherent tendency to lead one into moral danger.[90] In situations like *Death in Brunswick*, there is often an important conflict—between realizing the duties of loyal friendship and fulfilling one's other moral duties—but this sort of conflict might nevertheless be internal to morality. One aim of this paper has been to point to a distinctive and important kind of conflict that can arise for a friend because of the friend's duty sometimes to defer to the other, even about moral questions. The trouble with friendship and other voluntary relationships is that, by becoming friends with another and so by creating duties of friendship owed to that other, persons assume some risk that their friend will call on them and, in doing so, place them in situations where they must face such hard choices. However, if we are to hold that, because of the great good that friendship realizes for persons, it is permissible for them to form friendships with others, we are committed to holding that this risk is morally permissible for persons to take.

And, because close friends have this duty of friendship sometimes to defer to each other, they will confront at times a conflict in their individual deliberations that is importantly analogous to the one the reasonable and engaged citizen confronts: one friend will sometimes be required to defer to the other, but this requirement will sometimes strike the friend as a

[90] Cocking and Kennett reference this joke, and they note, rightly, that this sort of joke is funny because of the gap we see between an idealized view of friendship and "what rings true of our ordinary experience" of friendship. See Cocking and Kennett (2000), 278.

requirement to do what is wrong or otherwise mistaken. In this way, the requirement that she defer—a requirement of friendship—will sometimes conflict with her own deeply held convictions. But, because the friends are connected by a valuable relationship of friendship, each recognizes this value by possessing a deep commitment to be a good friend to the other and a willingness to act on that commitment. When a friend fulfills this duty to defer to his friend, even when he disagrees with her judgment, he acts out of this deep commitment that he has and so he abides by his own will in the right sense. His deference, which is required of him as a friend, is compatible with his freedom because it is an expression of it.

As I will argue in the next chapter, co-citizenship in a democratic community of free and equal citizens, will be another valuable relationship defined in part by a mutual aspiration to respect one another's freedom. In this sort of political community, then, the citizen who reasonably disagrees with some law can recognize upholding that law as a constitutive duty of her valuable relationship of co-citizenship in a democratic community pursuing just governance by law. Upholding the law, then, which is required of her as a democratic citizen, is compatible with her freedom because it is an expression of it.

VII. DEMOCRATIC COMMUNITY

As I argued in Chapter IV, the free and equal citizen has not only an interest in substantive justice but also a separate interest in participation: She has an interest, separate from her interest in substantive justice, in having a say in the selection of laws, one equal to the say had by her fellow citizens. Respecting one's fellow citizens as free and equal, then, requires allowing them to be actual authors of the law governing them. However, for the free citizen to respect her fellows in this way is, in circumstances of reasonable disagreement about rights and justice, for her to uphold the judgment of the majority as authoritative law for the community, even if she disagrees with the substance of that decision, even if she thinks it unjust.

Here, then, we confront what I have called 'the conscience objection': Being forced to uphold laws one thinks unjust and so to act in ways that go against one's own deep and considered convictions about justice infringes on one's freedom in an important way. We must respond to this objection, for a person's duty to respect others as free and equal does not give her a duty to uphold the law unless upholding the law—or, deferring to the judgment of the majority—is compatible with her own freedom. Of course, this is not to say that argument of Chapter V for democratic institutions must be rejected. It is only to say that the argument is incomplete as it stands and so is not a full democratic account of political obligation. I argue in this chapter that, in order for the free and equal citizen to have a duty to uphold the law, her community's democratic institutions must be embedded in a genuinely democratic community.

In the account of close friendship and the duty to defer presented in Chapter VI, one crucial move is the claim that, since proper care for your

friend is care for her as a free person, showing proper care for her will sometimes require that you defer to her. To defer to her, then, is sometimes *the* way for you to care for her properly as a friend. Now, a close friend is genuinely committed to being a good friend and so is motivated to do whatever shows proper care for his friend. Here is where the claim that deference sometimes constitutes proper care is crucial: A close friend, because he is committed to being a good friend, will not only be willing to defer to his friend when doing so constitutes proper care but he will value doing so because it constitutes proper care. It is this connection between his deference and his commitment to being a good friend that explains why his deference does not infringe on his freedom: since the commitment is his—he embraces it as part of his identity—the actions required by it, including deference, are also his. In this context, a friendship version of the conscience objection cannot get off the ground, for to defer when the friendship requires it is to act out of the commitment one has to the relationship and to the friend.

1. The Democratic Community Account

My aim in this chapter is to present an account of citizenship in a democratic community of law and of the duty to uphold the law that makes an analogous move: Proper civic care or concern for your fellow citizens is concern for them as free persons, and so, in circumstances of reasonable disagreement in a democratic community of law, showing proper civic care or concern for them will sometimes require that you uphold a law that you think unjust. The idea is that, in a democratic community of law, respecting your fellow citizens' interests in participation by upholding the law ought to be understood as expressing a kind of civic care or concern for them as fellow

citizens. Indeed, since co-citizenship in a democratic community of law is a relationship defined by a common project of realizing a community of free and equal persons, all the duties of citizenship may be understood as duties of civic concern for one's fellow citizens.

Of course, you ought to aspire to live with others as free and equal persons even in a state of nature, for that is what justice requires. But, as I argued in Chapter IV, you cannot realize that aspiration while remaining in a state of nature because of the inevitability of persistent *reasonable* disagreement about justice.[1] In a state of nature—in a situation where no political authority exists—each person possesses the right to act according to her own determinations of her rights and duties. Her determinations are unilateral, even though they purport also to determine those duties of others that are the correlatives of her rights. Because persons—you and others—will inevitably reasonably disagree about these rights and duties, you cannot allow those others to implement their conflicting determinations, for to do so would be for you to abdicate your own right to act according to your own determinations. In this way, you cannot allow these others to exercise their right to determine what rightful relations among you and them requires—an exercise they rightly value as free persons—without refraining from exercising your own right. So long as you and these others together lack some way to arrive at a common and authoritative determination of rights and duties, you cannot allow them to exercise their right without abdicating your own, and to abdicate this would be for you to fail to assert your equal right to freedom.

[1] It is because you cannot realize this aspiration in a state of nature that Kant argues that, should you find yourself in a state of nature with others, your duty is to enter into "a rightful condition"—or, a community of law—with them. You may also force others into such a condition with you because, by refusing to enter into it voluntarily and instead choosing to remain in a state of nature, they do wrong "in the highest degree." See Kant (1996), 451-452 (6:312).

What democratic governance by authoritative law does, then, is it enables persons to live together in such a way that all are able to satisfy their interest in participating in determining what rightful relations among them require and so in spelling out publicly in law the boundaries of their rights and duties. The opportunity to live in such a community is something the reasonable and engaged citizen will greatly value: it is only in such a community that she can realize her aspiration to live among others as free and equal persons, for it is only in such a community that she can allow them to participate in determining the standards of right without endangering her own freedom.[2] This concern that she has to respect her fellows' interests as free and equal in this sort of participation, since it can be an *active* concern only in a democratic community of law and not in a state of nature, is distinctive, it seems, of this sort of democratic political community. In this way, this active concern ought to be considered to be an important kind of *civic* care for one's fellow citizens that is distinctive of (because it is made possible by) the relationship of co-citizenship in a democratic community of law.[3]

By showing how expressing proper civic care for one's fellow citizens of a democratic community sometimes requires upholding a law one thinks

[2] She has reason to value living in such a community because doing so—living in a community of free and equal persons—at least contribute to her ability to live a fully flourishing life. In other words, her own good is promoted by achieving justice for the community in which she lives. For discussion (and a qualified endorsement) of this sort of view, see Ronald Dworkin's *Sovereign Equality* (2000), 263-267.

[3] Civic care is quite similar to what Rawls calls "a sense of justice": "a normally effective desire to apply and to act on the principles of justice" (Rawls (1999d), 442). Importantly for our purposes, the sense of justice "is not… a form of blind obedience to arbitrary principles unrelated to rational aims" (Rawls (1999d), 417). Because citizens, in their capacity as co-authors of law—and so as interpreters of the basic principles of justice—must make complex judgments about how to realize justice in their world, it is important that they have a sense of the 'rational aims' that ground the principles, and it is this sense, and the desire to realize those aims in the law, that civic care consists in.

unjust, we have a way of replying to the conscience objection: Though upholding this law may conflict with certain of the reasonable and engaged citizen's deeply-held convictions about substantive justice, upholding the law will be required by other of her deeply-held convictions about justice, namely by her commitment, arising from her citizenship, to respect her fellows as equal participants in the community's project of law.

While the reasonable and engaged citizen will still confront a conflict about what she is to do when she confronts a law she thinks unjust—'Should I uphold the law or not?'—this conflict will be internal to her conscience and so she will be unable to complain that a duty to uphold the law of a democratic community infringes on her freedom by forcing her to act against her conscience.[4] In circumstances of reasonable disagreement among citizens of a democratic community of law, the pursuit of justice is a joint project that requires of its citizens, among other things, that they uphold the law as their community's attempt at realizing the aspiration for a community of free and equal persons. In these circumstances, the proper way for the reasonable and engaged citizen to express her commitment to justice will sometimes consist in upholding the law even when she reasonably thinks it unjust.

A complete description of this sort of democratic community is an enormous undertaking, requiring one to make claims about institutional design that rely not only on judgments of political morality, but also judgments of political sociology and economy. I am unequipped with the relevant knowledge from empirical political science to make those sorts of judgments. My aim in this chapter, then, is to offer elements of an account of

[4] And so, the aim here is *not* somehow to show that the democratic citizen does not face a hard moral decision here. The conflict she feels is a genuine one, but it is a conflict between two values both of which she herself is committed to honoring.

this sort of democratic community that focuses on only certain issues and problems; in this way, the account will be in significant ways incomplete. After explaining how this democratic community account of political obligation is an associative obligation account, I explain what I mean by 'civic care' and 'civic trust' in order to combat the more immediate objections that a community characterized by them is hopelessly ideal or naive. I also respond to worries about the related claim the account makes that the reasonable and engaged citizen will identify with her political community. These worries are that this sort of identification leads to a kind of political quietism incompatible with democratic engagement and that it may, in the extreme, threaten the individuality of citizens. At the end, I confront the question of civil disobedience, arguing that civil disobedience can in certain special circumstances be a justified way for citizens of this sort of democratic community of law to engage in politics.

2. Associative Obligations

The account developed here in response to the conscience objection is a kind of associative obligation account of the duty to uphold the law. Ronald Dworkin and Yael Tamir each have recently defended associative accounts of political obligation, and A. John Simmons has argued forcefully (and unsurprisingly) against such associative accounts. There is, however, no accepted conception of associative obligations and so no accepted understanding of what an associative account of political obligation is committed to. It is important, then, for me to explain what my account, as an associative obligation account, is and is not committed to before explaining why I find it the appropriate sort of account to reply to the conscience

objection.

2.1 Associative obligations and external justification

In *Law's Empire,* Dworkin characterizes associative obligations as "the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbors."[5] Dworkin does not mean here that associative obligations, because they are assigned by social practice, are purely conventional: members of such groups do not have the special responsibilities attached to their membership simply because social practice attaches them. While important aspects of the responsibility-sets attached to these sorts of relationships are conventional, there will still be core responsibilities constitutive of the relationship-type. For instance, the duty of care characteristic of close friendship is partly constitutive of that type of relationship: a relationship is not a close friendship unless the friends recognize the right kind of duty of care for the other. What this duty of care requires in particular circumstances will depend, of course, on the society in which the friends live and the social mores they have internalized, for what expresses care varies across societies.[6] But, that friendship is partly constituted by the appropriate kind of mutual care—one different from the mutual care characteristic of parents or spouses—seems not to vary in that way.[7]

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[5] Dworkin (1986), 196.

[6] For discussion, see Raz's account of how social forms affect the ways in which relationships and responsibilities are concretized. Raz (1986), 308-313, 348-357.

[7] This is not entirely right. Because the character of a particular friendship is in many ways up to the friends themselves to define, they may develop a friendship that approximates what, in their society, normally characterizes the relationship of parent-child or of spouses. And so, it will not be the case that there is always a clear distinction to be made between these relationships and friendships based on the practices constitutive of each. But, in cases where the friendship approximates these other sorts of relationships, we would normally be hesitant

This point is important, I think, because it makes clear that an associative obligation account need not be committed to what Simmons in "Associative Political Obligations" has called 'the normative independence thesis,' which is the claim that associative obligations are "internally justified or self-justifying."[8] The claim that obligations are 'self-justifying' is, on Simmons' view, the claim that local social rules and practices can, simply by defining group roles or relationships and by assigning individuals to them, generate for those individuals genuine moral obligations.[9] Simmons rightly finds this thesis implausible. But rejecting this thesis does not require that we reject the possibility of genuine associative obligations, only that we insist that such obligations be 'externally justified.'[10]

Now, Simmons makes much of this 'external justification' requirement, though the avenues for external justification that he allows only justify purported associative obligations by *reducing* them to some other kind of obligation; as a result, Simmons' view ends up denying that we can have genuine associative obligations. The claim that associative obligations require external justification amounts, on Simmons' view, to the claim that "institutional obligations acquire moral force only by being required by external moral rules," that is, "by a moral rule (or principle) that is not in itself a rule of the institution in question."[11] The first option for external justification he admits is the voluntarist option: A person's institutional obligations have

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to classify it as a friendship, even if we would not classify it as the other sort of relationship either.

[8] Simmons (2001), 70, 81.

[9] Simmons (2001), 70.

[10] Simmons also discusses these issues in *Moral Principles and Political Obligations* (1979), 16-23 and in "External Justifications and Institutional Roles" in *Jusification and Legitimacy* (2001), 93-101.

[11] Simmons, (2001), 96. See also Christopher Heath Wellman's account of the differences between reductionism and what he calls "associativism" about political obligations and his defense of reductionism in "Relational Fact in Liberal Political Theory" (2000).

moral force as genuine moral obligations when she has freely consented to (or voluntarily accepted the benefits of) occupying the institutional role and bearing its attendant obligations. They are genuine obligations, then, because they are consent-based obligations. Simmons rightly notes that, because the impetus behind the associative obligation approach to political obligation is to provide an alternative to a consent account, it cannot provide such an alternative if it justifies associative obligations by reducing them to consent-based ones.[12] An associative obligation approach, then, must pursue external justification in another way.

We are left, then, with Simmons' second option: the individual's institutional obligations have moral force when fulfilling those obligations is the most effective way for her to fulfill her more basic moral duties.[13] Institutions may solve coordination or information problems or otherwise make it possible for a person to discharge her duties more effectively; when they do so, the institutional duties it assigns to her have moral force. For instance, a person's natural duty to promote justice can, given the presence of the right institutions, give her a genuine duty to pay her taxes or serve on a jury.[14] However, as many have urged (and as I discussed in Chapter IV), this second way of justifying purported associative obligations will fail to get genuine special obligations, for it will not get obligations that meet the particularity requirement.

The particularity requirement holds that a special obligation—which an associative obligation purports to be—must be an obligation owed to

[12] Simmons (2001), 66.
[13] Simmons (2001), 95.
[14] This is because the presence of the institutions makes paying taxes or serving on a jury a particularly effective way to promote justice and the duty to promote justice requires that, unless there are conflicting moral considerations, one ought to choose the most effective means to promote justice. For discussion, see Chapter IV §1.

particular persons or communities.[15] And, as Simmons notes, "more general moral duties with possible political content, such as duties to promote justice, equality or utility cannot explain (or justify, or be) our political obligations, for such duties do not necessarily tie us either to one particular community or to her own community."[16] Justifying purported associative obligations in this second way reduces them to simple concretizations of our moral duties to bring about more of a particular state of affairs.[17] On this second option, they are genuine obligations precisely because they are not particular.

As I argued in Chapter IV, it is a mistake to take the natural duty of justice to be something like a duty to promote the occurrences of justice being done in the world. Instead, it is a duty, first and foremost, to interact with persons in a just way, even if doing so requires passing up chances to promote the occurrences of just relations overall. As a genuine moral duty, of course, this duty of justice is still one we owe to all persons simply in virtue of their status as persons. However, what it takes to interact with a particular person in a just way will depend, in large part, on the kinds of interaction we have with her, and so what the duty of justice requires of us with regard to her will be particularized according to the kinds of interaction the duty governs. And, as I have argued, our interactions with some others may be such that the duty of justice requires that we enter into (or recognize as already existing) a relationship of co-citizenship with them, for justice requires that our interactions with them be governed by authoritative law.[18] The claim in this

[15] For discussion of the particularity requirement, see Simmons (1979), 31-35; Klosko (1992), 4; Green (1988), 228; and Wellman and Simmons (2005), 34-37.
[16] Simmons (2001), 68.
[17] For examples of such accounts, see Robert Goodin's "What Is So Special About Our Fellow Countrymen?" (1988) and Martha Nussbaum's "Patriotism and Cosmopolitanism" in her *For Love of Country* (1996).
[18] In his "Surrender of Judgment and the Consent Theory of Political Authority," Mark Murphy presents a consent account of political obligation that takes the person's recognition

chapter is that the relationship of co-citizenship in a democratic community of law will give rise to certain constitutive duties, including the duty to uphold the law, that we can justify as associative obligations of justice. But, of course, we can only justify them as associative obligations if there is another option for external justification besides the two Simmons allows.

Now, friendship is arguably one of the paradigmatic sources of associative obligations.[19] Friendship, however, does not give us reasons, first and foremost, to promote the occurrences of friendship overall or their health; it gives us reasons, first and foremost, to be good friends to the friends we have.[20] The duties of friendship, then, cannot be externally justified according to Simmons' second option, for we cannot understand them as simple concretizations of a general moral duty to realize friendship. But neither are friendships voluntary in the way that the first, voluntarist option requires. Friendships are not formed by exchanges of consent nor do persons incur the obligations of friendship by 'voluntarily accepting' the benefits of friendship.[21] Persons may certainly avoid becoming friends with others—and to that extent friendships are voluntary—but the normal case, I think, is that a person becomes aware of her friendship with another by realizing that she already is

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of a duty to uphold the law as itself constituting her consent to that duty. See Murphy (1999). But, since recognizing a duty as a duty requires that the duty already exist prior to that recognition, any 'consent' via such recognition cannot ground the duty.

[19] Though the relationship of parent and child seems the clearest example of a relationship that gives rise to associative obligations because the child's obligations cannot be justified in a voluntarist way, this relationship seems a poor analogue to the relationship of co-citizenship between democratic citizens. The relationship of friendship, because it is (or at least aspires to be) a relationship between equals, seems a better one.

[20] See Scanlon (1998), 88-90.

[21] By 'voluntary acceptance,' I mean what Simmons means by it in his discussion of the principle of fairness. To count as voluntarily accepting a benefit, on Simmons' view, the person must either "have tried to get (and succeeded in getting the benefit, or… must have taken the benefit willingly and knowingly" (Simmons (2001), 18). And so, a person cannot unknowingly voluntarily accept a benefit.

friends with that other and so already has duties of friendship towards him.[22] In this normal case of friendship, then, her duties of friendship owed to him cannot be externally justified according to Simmons' first option.

But friendships certainly do give friends genuine special responsibilities towards each other because they are friends.[23] So there must be another way to justify associative obligations, one that, though non-voluntarist, still satisfies the particularity requirement. Samuel Scheffler's 'non-reductive' account, which he sketches in his "Relationships and Responsibilities" and which I introduced in Chapter VI, seems a third option.[24] On this non-reductive account, a person's institutional obligations have moral force when (a) the relationship in question is a non-instrumentally valuable one and (b) she cannot value that relationship in the right way without seeing the particular institutional obligations attached to it as genuine moral obligations.[25] On Scheffler's account, a person's associative obligations are

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[22] A voluntarist could tell a story about the development of a friendship whereby the persons voluntarily accepted the benefits of friendship by doing things that *they should have known* would count as voluntary acceptance, thereby getting a voluntarist account of the duties of friendship that is compatible with the experience of discovering these duties. This sort of account, though, seems quite strained—the presence of mutual care and trust seems not a necessary part of this sort of story—and it should seem an attractive way to account for the duties of friendship only if one has already accepted the claim that all special (particularized) responsibilities must be voluntarist ones. The phenomenology of friendship would seem to point away from that sort of account.

[23] In his "Friends, Compariots and Special Political Obligations," Wellman rejects the claim that friendships give rise to duties of friendship. His argument is twofold: (1) In cases where a friend has acted badly as a friend, it is not that she has failed to do her duty but that she has revealed something bad about her character. And (2), when it is the case that some action is appropriate for one friend to do as a friend, the other friend cannot assert a claim right against her that she do it. See Wellman (2001), 224-230. But the claim that being a good friend requires the exercise of virtues is compatible with the claim that it also requires doing certain things for one's friend. And, it is not the case that all duties have correlative rights attached to them. All that the claim that there are duties of friendship requires is that the relationship of friendship gives rise to certain kinds of reasons for action, reasons the friends regard as ones that, barring special circumstances, they must act upon because they are friends.

[24] In this way, Simmons' account is mistaken in implying that external justification requires reduction.

[25] Scheffler (2001), 97-110. Scheffler's account provides a way past Wellman's objection that an associative account, if it finds that some relationships give rise to duties, must say that all

genuine when those obligations are *constitutive* duties of a valuable relationship, that is, when fulfilling those obligations is part of what is required for the person to be in the relationship at all. As I have argued in Chapter VI, a friend cannot value her friendship in the right way—specifically, as a relationship of mutual care between free persons—without seeing herself as having a duty sometimes to defer to the other. Such obligations are particularized—she only owes them to those others with whom she has a genuine friendship—even though they are not voluntarist in Simmons' sense.

In addition to providing an alternative to Simmons' two reductive ways of justifying associative obligations, Scheffler's non-reductive way allows us to avoid Yael Tamir's implausible claim in her *Liberal Nationalism* that, "since they [associative obligations] grow from relatedness and identity, they are independent of the normative nature of the association."[26] For Tamir, associative obligations are grounded in what she calls "connectedness," or in "the *belief* that we all belong to a group whose existence we consider valuable."[27] On Tamir's version of a non-reductive view, an individual's institutional obligations have moral force when the individual, *by valuing the relationship in the way she does*, cannot help but see those institutional obligations as genuine moral obligations. For Tamir, no distinction needs to be made between felt obligations and genuine obligations, for the feeling of belonging not only gets you felt obligations but also, in doing so, gets you genuine ones.

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relationships do so or, to avoid this consequence, must rely on common moral convictions for determining what relationships give rise to what duties. See Wellman (2000), 552-554.

[26] Tamir (1993), 101.

[27] Tamir (1993), 98. Emphasis added.

As Tamir admits, her view holds that Mafia members, for example, possess genuine associative obligations to their fellow Mafia: "they have an obligation to attend to each other's needs, to protect each other, to support the families of the those killed 'in action,' and the like."[28] Put this way, this result might seem perfectly benign. But I suspect it seems so only because these obligations are not actually distinctive of Mafia membership. Insofar as Mafia members do have these particular obligations to one another—and it is not obvious that they do[29]—they have them because they are also friends, close business associates, etc., and not because they are members of the Mafia. The claim that genuine obligations arise simply out of feelings of belonging, when applied to the case of the Mafia member, actually has much less benign results: Those Mafia members who think that what makes the Mafia a distinctive group also makes it a valuable one will, on Tamir's view, possess genuine obligations to participate in the criminal and violent activities distinctive of the Mafia.[30] And this consequence, I think, gives us good reason to reject Tamir's view.[31]

Tamir settles on this account of associative obligations because, she

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[28] Tamir (1993), 101.

[29] It may be that, because the distinctive aims of the Mafia involve deeply immoral actions, the care and loyalty that develop among them does not give rise to genuine duties of care towards one another—even though it would were they in a relationship defined by morally acceptable aims—and it does not because, by fulfilling those duties, they cultivate and sustain the relationship. On this view, since the aims of the Mafia are deeply immoral, it is quite wrong to cultivate and sustain the relationships constitutive of Mafia membership and so Mafia members do not actually have genuine duties of care towards one another.

[30] Tamir's view also implies that, for example, a teenager who is alienated from and deeply ashamed of his parents does not have associative obligations towards them since he lacks the right feelings of relatedness. Scheffler points out that this is a consequence of views like Tamir's. See Scheffler (2001), 102-103.

[31] Tamir's view seems to be that, even if her account does have this consequence, it is not a problem: the associative obligations of the Mafia are not ultimate ones and they will always be overridden by other moral duties. See Tamir (1993), 101. Saying that they will be overridden does not quite resolve the real problem: There is nothing of moral value lost—there is no reason for moral regret—when a Mafia member is deprived, say, of the chance to enforce (with characteristic violence) the Mafia's code of silence. For discussion of overridden obligations and 'moral regret,' see Edmundson (1998), 10-12, 95-96.

thinks, "if only morally valuable communities could generate associative obligations, the latter would become a meaningless concept."[32] But, as we see with Scheffler's non-reductive account, this claim is mistaken. On Scheffler's account, the individual has the associative obligations because she is in the valuable relationship—she belongs to it as a member—and, if she values the relationship as she should, she will have the appropriate feelings of belonging and relatedness. In this way, the valuable relationship justifies both the associative obligations and the feelings of belonging. Scheffler's account, then, gets us genuine (non-derivative) associative obligations while also allowing us to say that individuals can have associative obligations they think they lack—because they fail to value properly the relationship they are in—and can lack ones they think they have—because they mistakenly value a relationship.[33]

2.2 The duty to uphold the law as an associative obligation

Why an associative account of political obligation? Establishing rightful relations with others, as I have argued, requires that you and some others be governed by authoritative law, law as determined by democratic procedures and institutions. When this democratic law is authoritative—when it both is created by and sustains principled politics in pursuit of a community of free and equal persons—the *relationship* of co-citizenship you have with each of your fellow citizens is a non-instrumentally valuable relationship marked, in part, by relations of mutual civic care. Granted, on account of the natural duty of justice, this relationship of co-citizenship, unlike friendship, is required of you. But, like friendship, co-

[32] Tamir (1993), 102.
[33] Scheffler (2001), 103.

citizenship in this sort of community is non-instrumentally valuable, in part, because it is marked by a mutual aspiration among citizens to respect each other as free persons.

This parallel between friendship and co-citizenship in a democratic community of law seems very important for two reasons: (1) Just as friendship has its particular kind of mutual care and mutual trust, which together ground the duty of friends to defer, co-citizenship in this community will have its own kind of civic care and civic trust that together ground the duty of citizens to uphold the law. A complete account of the duty to uphold the law in this community, then, must explain what it is for a community to be characterized by this civic care and civic trust. And (2), once we have this sort of account, we can respond to the conscience objection by pointing out that the reasonable and engaged citizen, insofar as she cares about justice, will value her relationship of co-citizenship with her fellow citizens—she will identify with it—and so she will see herself as having a special duty as a citizen committed to the project of a community of free and equal persons to uphold the law. She will possess a basic commitment to be a good citizen, and this commitment will include a commitment to upholding the law, even when she disagrees with it.

With these two claims, this associative account completes my account of the duty to uphold democratic law, for each claim is an important addition to the overall account: (1) The presence of democratic institutions is not, by itself, enough for a duty to uphold the law. These institutions must be embedded in a democratic culture, for it is only then that respecting others' interests in participation by upholding the law is required for you to show proper care for them as free persons because it is only then that doing so does

not make you objectionably vulnerable to harm by their decisions. Considered from the perspective of a citizen subject to law, the results of a decision procedure (even a democratic one) do not, considered by themselves, give that citizen enough information to determine whether those results are worthy of being upheld, for she cannot determine just from the results on what grounds the majority voted the way it did. It is not enough, then, that (the majority of) her fellow citizens each engage in principled political deliberation; it must be reasonable for her, as a citizen subject to the law that they have enacted, to *trust* that they are. And it is the nature of the political community as a whole—including especially the character of its political deliberations and debate prior to voting—that will or will not justify such trust.

And (2), because the reasonable and engaged citizen will value her relationship of co-citizenship, her loyalty—that to which she feels she must remain true in her political life—will be primarily to her fellow citizens as a community pursuing justice and so only derivatively to the law as her community's present attempt at creating, however imperfectly, a community of free and equal persons. This loyalty is justified because it is the way she, as a citizen, can express her more basic commitment to respect her fellow citizens as free and equal persons in circumstances of reasonable and democratic deliberation about rights and justice. And, this loyalty to her fellow citizens is compatible with engaging in critical reflection on the laws: The citizen may without disloyalty disagree with a law, criticize it publicly as unjust, and campaign for its reform. Indeed, her loyalty, as loyalty to her fellow citizens, may at times *require* such critical reflection, since, as members of a community pursuing justice, all citizens have an interest in enacting substantively just

laws. Political opposition, then, will often be the citizen's proper expression of loyalty in a community engaged in genuinely democratic politics, even when she also has a duty to uphold those laws she thinks unjust.

3. Civic Care, Civic Trust and the Duty to Uphold the Law

Mutual civic care, mutual civic trust and the duty to uphold the law in a community of democratic law and principled politics are interrelated in the same ways as mutual care, mutual trust and the duty to defer are in friendship. A citizen's willingness to uphold a law with which she disagrees expresses both her civic care for and her civic trust in her fellow citizens: It expresses both that she respects their interests in participation and that she trusts that, when exercising their political power, they will think not only of themselves but of their fellow citizens and so choose the candidate law they reasonably think best advances the community's project of justice. Were the relationship not characterized by reciprocal equal respect for judgment—were her fellow citizens unwilling to uphold a law with which they disagreed—she would have good reason to doubt both that they possess the right kind of civic care for their fellows—since they are unwilling to respect their fellows' interests in participation—and that they trust that their fellows reciprocate that civic care. In this context, then, the citizen would have good reason to doubt that the community's laws with which she disagrees are worthy of being upheld, for she would have good reason to doubt that they are the product of principled democratic deliberation.

3.1 Civic care

If the citizen is to have a duty to uphold the law, the political choices of her fellow citizens must not only be compatible with some liberal conception

of justice but must also be motivated (and so constrained) by their commitment to respect their fellow citizens as free and equal. At least two things must be true for their choices to count as motivated in this way: (1) They have selected their (reasonable) view because they think it the right one from the perspective of justice. And (2), were the tables turned—were they in the minority—they would recognize that their community's pursuit of justice requires of them that they uphold the law even when they disagree with it. In other words, in order for me to be required to care for them as fellow citizens—and to care for them specifically by deferring to their political choices—they must *reciprocate* that same care for me as a fellow citizen and do so in their political choices.

There will be, of course, no tie of intimacy among citizens of a democratic community to anchor their attitude of civic care for each other. Nor will citizens even be personally acquainted with very many of their fellow citizens. This lack of intimacy and even knowledge is the most readily apparent difference between civic care among democratic citizens and care between friends. But it is a mistake to assume that intimacy with and personal knowledge of the other are necessary features of *any* genuine relation of mutual care among persons. A relationship of mutual care, let us say, is a relation between persons who are moved to respond to the needs, interests, etc., of each other because they are the other's, and who are moved to an extent greater than what is required simply to respect each other as persons. Whether such a relationship is characterized by mutual intimacy and personal knowledge is an additional question, one that depends in part on the kinds of needs in question and on the nature of the response that is characteristic of the relationship. Close friendships, for instance, require deep intimacy and

personal knowledge if the friends are to be able to respond to each other's needs and interests in ways appropriate of close friends.

But a person can have needs, interests, etc., as a member of a group of persons—as a citizen, say—and responding in the right way to these needs, interests, etc., need not require personal knowledge of or intimacy with that person, only the knowledge that she is a member of that group. To characterize the democratic community as a community marked by relations of mutual civic care among citizens, then, is not to paint some hopelessly idealized and romantic picture of very small independent communities governed by some New England-style town meeting system. It is only to say that each citizen merits certain special treatment and regard in virtue of her status as a fellow citizen and that this can be profitably understood as civic care. This attitude of civic care, then, is *general*—it is a concern for every fellow citizen, but only as a fellow citizen—and so is expressed in a commitment to live with one's fellow citizens as free and equal persons, even if doing so might compete with some valued personal project. In this say, Rawls' claim that, in the just society, citizens will have a normally effective sense of justice and will be willing to act according to it—including in their political choices—is part of this claim that democratic citizens stand in relations of mutual civic care with each other that are distinctive of democratic community.[34]

In "On Civic Friendship," Sibyl Schwarzenbach makes similar claims about the nature of civic care in her account of civic (or political) friendship.[35]

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[34] For discussion of the sense of justice, see Rawls (1999d), 434-441.

[35] On her account, civic friendship among citizens is part of the solution to what she calls "the problem of political unity." This problem, as far as I understand Schwarzenbach here, has to do with what incentives, motivations, inclinations, etc., an account of the state claims citizens possess that bind them together into one state. My concern with civic friendship is not

She follows Aristotle in arguing that civic friendship is a genuine kind of friendship, for civic friends care for each other for the other's sake, are moved to act on that care and are each aware that this care is reciprocated. The major difference between personal and civic friendship, she argues, is that the active care constituting civic friendship is a "general concern":

> [This active care manifests itself] in socially recognized norms concerning the treatment of persons, say, in knowledge of the nature of the constitution, its quality, and its general level of support among the population, in what is publicly expected of persons in that society, what is concretely due them, and so on. Such public norms of regard and behavior are the normal ways citizens now 'know' of each other's reciprocal goodwill.[36]

Civic friends care for each other *qua* citizens and so are moved to respect and to help protect their rights and privileges as citizens.

I find it quite plausible that citizens can be civic friends in this way—and so motivated by civic care understood in this way—even though they do not know their fellow citizens personally or, as Schwarzenbach points out, even if they do know some and do not like them: "I may personally dislike a fellow citizen of mine and yet remain his civic friend [because] I will uphold certain public standards by which he must be treated in any given concrete situation."[37] Since it is the person's status as a fellow citizen—a status she shares with everyone else—that is relevant, what is owed to her is owed to all her fellow citizens and so can be specified by public norms. When they are so specified, citizens are able to compartmentalize how they treat each other such that whether or not they personally like some fellow citizen is irrelevant

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directly concerned with this problem, though one way to understand my claim here is that civic friendship is the kind of "political glue" that gives rise also to political obligation.

[36] Schwarzenbach (1996), 105-106.

[37] Schwarzenbach (1996), 108.

for whether they will treat him properly as a fellow citizen.[38]

But why might upholding laws with which one disagrees be required as part of proper civic care for one's fellow citizens? As I argued in Chapter V, citizens have two basic interests at stake in the community's project of law: one in substantive justice and the other in participation. Citizens, then, must be willing to respond appropriately in their political choices to both these interests if their relationship of co-citizenship is to be a relation of mutual care for each other as free persons. And upholding the law is sometimes *the* appropriate way for a citizen to respond to her fellows' interests in participation, for doing so shows that she recognizes that they, like her, are (a) citizens concerned that justice be done, (b) citizens with a reasonable view about how justice is to be done, and (c) citizens committed to the collective project of achieving justice as a community.

For her to uphold the law in circumstances of reasonable disagreement, then, is for her to acknowledge that her fellow citizens count just as much as responsible fellow authors of the laws as she does. And, because upholding the law shows that she counts them as responsible fellow authors, it also shows that she herself is committed, as a citizen, to the project of achieving justice as a community. It is by revealing this sort of commitment that she becomes able to demand recognition as someone thus committed—and so recognition as an equal participant in governance—from her fellow citizens should they confront a law she supports but with which they disagree. She may demand this sort of recognition from her fellows—recognition she values as a reasonable and engaged citizen—only if she is willing to reciprocate and

[38] That persons are able to compartmentalize in this way—they can be moved to treat a person rightly as a citizen, even if they personally dislike her—is important and valuable.

provide that recognition to her fellow reasonable and engaged citizens by upholding laws with which she disagrees.

To possess this civic care, then, requires that the citizen accept what Rawls calls 'the consequences' of the burdens of judgment. And the citizen who has accepted these consequences will approach deliberation and debate in the public forum in a certain way. She will admit both that there are a range of reasonable views about most questions that arise in the political process—especially questions of justice that matter greatly to citizens—and that her fellow citizens may arrive at competing reasonable views while motivated, as she is, by the appropriate kind of civic care. Now, the citizen need not feel less confident about her own particular convictions about justice simply because she admits that others' are reasonable. But, she must be inclined not to automatically interpret political disagreement cynically as the consequences of some looking out for their own interests at the expense of justice for all. She must be inclined instead to give her fellow citizens the benefit of the doubt.

And, since this civic care is, at bottom, a concern that each and every citizen is able to live as a free and equal citizen, this sort of care requires only that the citizen be committed to this ideal of the political community as a demand of justice, not that she be committed to any particular comprehensive doctrine or that she identify with an ethnic or national group. The citizen, then, cares for her fellows as co-participants in this *political* project.

3.2 Civic trust

In order for *justified* mutual civic care to obtain among citizens, there must also be justified mutual civic trust among them. The citizen whose

political choices are motivated (and so constrained) by her liberal conception of what justice is for such a community must be justified in trusting that her fellow citizens' political choices are similarly motivated (and constrained). And the citizen who upholds a law with which she disagrees must be justified in trusting that her fellow citizens would willingly do the same were they to find themselves confronted by a law with which they disagreed. If this sort of trust would not be justified, the citizen in either instance would not be participating in a valuable relationship of co-citizenship in a community of democratic law but would rather be making herself objectionably vulnerable to being harmed by the choices of her fellow citizens and, at the extreme, she would be participating in her own oppression by the majority.

Since there is no tie of intimacy among citizens and so no close knowledge of one another, civic trust will also be quite different from the trust that obtains between friends. Civic trust among citizens in a democratic community will be trust not in individual citizens—since one lacks the requisite knowledge of them as individuals that would justify such trust—but rather in the political community as a whole and so in the community's commitment to treating everyone as a free and equal citizen. Any trust that particular others *qua* citizens or officials will act in certain ways will be derivative of this basic trust in the community: it will be a presumption that the citizen or official, as a member of this democratic community, will treat one as a fellow citizen. Even if a particular citizen or official betrays this trust, and even if several do so, such instances of betrayal by themselves will be insufficient to call into question one's trust in the community. Or, more precisely, it will be insufficient provided that institutions provide genuine opportunities for the citizen to object to such mistreatment by officials or other

citizens and are responsive to such objections, for these institutional mechanisms, by expressing the community's commitment to treating all as free and equal, help to justify this civic trust in the face of particular betrayals.

In general, then, the political community's institutions must be designed in ways that will foster a justified civic trust among citizens. This requires two things: (1) that they be designed in ways that promote the development of mutual civic care among citizens; and (2) that they be designed so that citizens may express this civic care publicly to their fellow citizens. For instance, political institutions, for instance, must promote the quality and inclusiveness of public deliberation, and they must include within them offices effectively empowered to root out corruption, deceit, etc.[39]

There must also be effective mechanisms in place for the periodic review and reform of institutions. For instance, it may be that the burdens of paperwork needed to claim certain benefits prevents many who are entitled to them from claiming them; if the institution is not responsive to this sort of concern, the citizen faced with these burdens will have reason not to trust in the community's commitment to respect him as a fellow citizen. Or, it may be that the expense of effective counsel, by depriving many poorer citizens of access to effective counsel, prevents the community's adversarial system of legal justice from being justifiable to those citizens. If the community, via its institutions, is not responsive to this sort of concern, the poorer citizen facing trial without effective counsel will have good reason not to trust in the community's commitment to respect him as a fellow citizen. In this way, political and legal institutions must contain institutionally-embedded and

[39] Such as, for instance, effectively empowered and independent inspector general and ombudsman offices.

effective mechanisms for reform if the community's claimed commitment to justice—found, say, in its governing documents and the speeches of politicians—is to be plausible and trustworthy.

The laws of a democratic community set out in some detail the citizen's rights and privileges and so defines the terms according to which she may live out her life. It is important, then, that she be able to trust that she will be able to live out her life in the community on these terms. That the legal system as a whole and the official within it are committed to upholding the rule of law, then, is crucial for developing justified civic trust among citizens. But, this sort of trust in the regular and predictable administration of law, though important, is not the whole of civic trust, for political life is full of reasonable disagreement: disagreements about how to interpret the laws once enacted, about how to apply them, about how to enforce them. The community must express its civic care for its citizens not only in the content of the laws or in their administration, but also in the quality and inclusiveness of public deliberation and in its more basic constitutional commitments. In this way, civic trust cannot simply be trust that others will abide by the terms of daily interaction as set out in laws; civic trust must also be trust that one's fellows will be motivated in their decisions and actions, when appropriate, by proper civic care. Because of the reality of persistent reasonable disagreement, civic trust will be, in large part, trust in your fellow citizens' civic care.

3.3. Deliberation and public reason

An important expression of a citizen's civic care for her fellow citizens is her commitment to abide by the norms of public reason in her deliberations and votes in the public forum of debate and choice. And, when a

community's public debates abide by these norms of public reason, citizens have good reason to trust that the community's political decisions are motivated by proper civic care. The basic idea behind the norms of public reason is that a genuinely democratic community deliberates in a particular way, since it is a community committed to realizing a community of free and equal persons: the reasons citizens may offer in the public forum to justify their political choices are limited, as Rawls puts it, to "reasons consistent with seeing others as equals."[40] As I argued in Chapter V, only reasonable political conceptions of justice are conceptions consistent with seeing all citizens as free and equal. The reasons citizens may offer, then, are reasons deriving from whichever reasonable political conception of justice they accept as true.

In a democratic community, citizens have what Rawls calls "their duty of civility" to abide by the norms of public reason, and this duty is "an intrinsically moral duty," not a legal one.[41] This duty of civility, though, should not feel to the citizen of a democratic community as a burdensome constraint preventing her from arguing for what she thinks true. The citizen should regard abiding by this duty as a way for her to participate in the valuable relationship of co-citizenship with her fellow citizens. By abiding by this duty, she respects her fellows as reasonable democratic citizens by justifying her choices according to a conception of justice that they can recognize as at least reasonable, if not correct.

As Rawls puts it, she treats them as "as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position."[42] If they, as reasonable, are able to recognize her and others'

[40] Rawls (1999b), 139.
[41] Rawls (1999b), 136.
[42] Rawls (1999b), 137.

political choices as at least reasonable, they can recognize the results of the vote as their community's law rather than as an exercise of domination, for they can see that she and the others are pursuing justice. And, if they can see that she is abiding by the norms of public reason and thereby treating them as free and equal citizens, they have good reason to trust that her political choices are motivated by proper civic care. In this way, public deliberation that abides by the norms of public reason is an important expression of mutual civic care and so an important basis for justified mutual civic trust.

It is only when citizens can recognize their fellows' political choices as reasonable—as stemming from a liberal conception of justice—that they can see the exercise of state coercion as connected to the community's self-governance by authoritative law rather than as an exercise of one group's domination of another. By constraining the reasons she offers in support of her political choices, the citizen affirms her commitment to governance by authoritative law, thereby giving her fellow citizens good reasons to trust that her political choices are motivated by proper civic care for them.

4. Freedom and the Duty to Uphold the Law

On the democratic community account, we are to understand the citizen's duty to uphold the law in the context of her valuable relationship of co-citizenship with others in a democratic community: She must uphold the law, even a law with which she disagrees, so that their relationship of co-citizenship will be one of mutual appreciation of each other's freedom; or, alternatively, she must uphold the law so that their political community may pursue justice in law in ways that respect all as free and equal citizens.

In the context of this relationship, the meaning of the reasonable and

engaged citizen's act of upholding a law with which she disagrees is transformed. Since the relationship is one of mutual civic care and civic trust, deferring to the political judgment of the majority by upholding a law with which she disagrees does not mean that she lacks proper care for her own interests, for she only has moral reason to defer because their political judgment is motivated by the proper sort of care for their fellow citizens, including her. And, since this deference is compatible with proper care for herself, she is able to express a valuable sort of care for her fellow citizens—care for them as fellow participants in governing—by upholding the law while continuing to care properly for herself and her own interests.

By upholding the law, the reasonable and engaged citizen respects both her fellow citizens *qua* citizens and their collective project of a society of free and equal persons. Saying this does not mean, of course, that this citizen will not sometimes feel alienated from her actions when she must uphold a law with which she disagrees, for she would not do what the law directs were it up to her. What it does mean is that this alienation is not itself a mark of unfreedom, for her upholding the law is the proper expression of a basic commitment to being a good democratic citizen. Such a commitment to democratic citizenship—one her duty of justice in this context requires she have—provides the right sort of connection between her will and her upholding laws with which she disagrees such that the authority of those laws do not violate the freedom constraint. Indeed, upholding those laws is compatible with her freedom because, as an expression of her own basic commitment to democratic citizenship, it counts as an expression of it.

This duty to uphold the law is compatible with the reasonable and engaged citizen's freedom, then, because she herself possesses the

commitment to fulfill this duty as required by democratic citizenship. Now, someone might object that, this is all well and good for the citizen who actually does have this commitment—the reasonable and engaged citizen—but the explanation is not available for the citizen who lacks this commitment. Holding this other citizen to a duty to uphold the law now seems to violate the freedom constraint, since she lacks the commitment that I have argued is what connects her deference in the right way to her will. My account, then, seems to have the perverse consequence of finding only those who are willing to uphold the law with a duty to do so.

This objection misunderstands, I think, the role that this commitment plays in the democratic community account. Consider friendship first, for the objection, if right about citizenship, will also apply to friendship. It is a mistake, I think, to argue that a friend who lacks the commitment to being a good friend—a commitment that, because she is a friend, she *ought* to have—thereby has a freedom-based complaint against her duties of friendship, including the duty sometimes to defer to her friend. The problem here lies not with the duty—it is not actually an imposition—but with her will. It is not a distortion of the notion of freedom to say that a person's duties arising out of her valuable relationships are compatible with her freedom, even if she wrongly lacks the right kind of commitment to those relationships, for they are nonetheless *her* relationships. The choice either to be or to refuse (permissibly) to be committed to one's valuable relationships is simply not a choice that persons have reason to value.

Now, it would be a distortion of the notion of freedom to say the same about purported duties arising out of a valuable relationship that a person should but does not actually have. Since she does not have the

relationship—it does not actually exist, even though it should—to hold her to the duties that would arise from them were they to exist would be to deny her the opportunities, which she rightly values, to determine for herself which relationships she will and will not enter into with others. A person, then, who refuses to become friends with someone thereby does avoid having duties of friendship towards him, even if she should, we think, become friends with him. And she avoids them here because it is up to her with whom she becomes friends.

What is different about the relationship of co-citizenship is that it is not up to the citizen to decide whether and with whom she will share the valuable relationship of co-citizenship in a democratic community. Since this relationship is required by justice, the citizen has no complaint should she simply find herself in one, that is, should she find herself claimed by the democratic community into which she was born and so held to have the duties of citizenship. A citizen of such a community who wrongly lacks the commitment to democratic citizenship, then, will not have a freedom complaint against a duty to uphold the law, for the fault lies with her will's lack of this commitment to democratic citizenship, not with this duty and the actions it requires of her.

Of course, the reasonable and engaged citizen is unlikely to think all the laws of her community are correct from the perspective of justice. This is one of the unavoidable consequences of the burdens of judgment. And, precisely because she is committed to the community's project of achieving a community of free and equal citizens, this citizen will feel a tension between the two aspects of political justice—the substantive and participatory aspects—in that, by her own lights, she cannot fully respect both in her

actions. As Gerald Postema puts it, "justice always has two sides, one ideal and one consensual" and "between them there is always a tension."[43] This tension emerges almost unavoidably because of the nature of the reasonable and engaged citizen's political engagement: When deliberating about what candidate law to support, the questions is almost solely one about substantive or 'ideal' justice; once a vote has been taken, the reasons for upholding the results seem to shift towards 'consensual' justice and respecting the value of participation.[44]

What she is engaged in, though, is not her individual pursuit of justice but her community's collective pursuit of justice in circumstances of reasonable disagreement about rights and justice. And so, the sort of democratic community in which citizens will have a duty to uphold the law will not, from the perspective of many reasonable and engaged citizens, actually *be* a community of free and equal persons, for that is what they reasonably disagree about when they disagree about rights and justice. But, it will at least be a community pursuing the project of achieving that sort of community in a way that respects all as free and equal.

5. Identifying with the Community and Citizen Loyalty

For citizens to have a duty to uphold the law, then, the relationships of co-citizenship among them must be marked by well-founded civic care and civic trust. Another way to put the claim is to say that (the majority of) citizens must *identify* with the community and its laws. Citizens must regard the common good of the community as part of their own individual good such

[43] Postema (1997), 843.
[44] It is this shift that Richard Wollheim worried gave rise to a paradox in the theory of democracy. See Wollheim (1963).

that they consider acting for the sake of the common good—acting justly—to be part of their pursuit of their own good. For the reasonable and engaged citizen, participation in the life of a community engaged in principled politics is an important intrinsic good, for participation in joint governance by a set of laws is the main way the citizen expresses her commitment to the end of political justice and so is an important way for her to express her basic respect for her fellow citizens.[45] Such talk of identification is not new: Rousseau argues that, in the just state, citizens will identify with their community. Today, it is mostly communitarians who emphasize the importance of identification. I argue, though, that even liberals need to be concerned with identification, for citizens will have a duty to obey the law only when their community is such that they ought to identify with it (and when most of their fellows do identify with it).

5.1 Rousseau on identifying with the community

But what exactly is the character of this citizen's identification with her community? On Joshua Cohen's 'social autonomy' reading of Rousseau,[46] the free citizen must identify with the general will: her relation to the general will must be a subjective one in which, as Neuhouser puts the view, she "regularly recognize[s] and embrace[s] the common good as [her] own deepest interest" and sees "the general will (and the legislation that comes from it) as expressing a consciously shared conception of the common good."[47] It is only when the citizen has this subjective relation to the general will and the

[45] This sort of claim, I take it, is ultimately compatible with Rawls' commitment to justice as fairness being a strictly political conception, for all it requires is that a citizen's conception of the good, whether or not it consists in a commitment to a comprehensive doctrine, include the end of political justice as a constituent part.
[46] Cohen (1986).
[47] Neuhouser (2000), 59.

resulting legislation that the general will counts as the citizen's own will and so it is only then that the citizen can be said to be free when she upholds the law. As Cohen explains

> [free persons] want more than an availability of alternatives within a system of laws and institutions that they view as a set of constraints imposed by others on their action. Rather, they want to be able to regard those institutional 'constraints' as themselves conforming to their own judgments of what is right. […] [T]he free person wants to affirm the framework of rules itself.[48]

On this reading of Rousseau, the tension the reasonable and engaged citizen feels when confronted by a law she thinks unjust but that she must uphold—a tension that I have argued is unavoidable in the politics of a democratic community—signals that she is not a fully free citizen, for she is unable to affirm fully that the laws conform to her own judgment of what is right. Frederick Neuhouser, for his part, argues for a different, more complex reading of Rousseau in *Foundations of Hegel's Social Theory*,[49] but he agrees with Cohen that, on Rousseau's view, the citizen who lacks this subjective relation to the general will thereby suffers from an objectionable lack of freedom, for she will not count as abiding by her own will when she obeys the general will.

5.2 Identifying with the democratic community

The kind of identification relevant for an account of the free citizen's political obligations is not any identification with particular laws—even fundamental or basic ones—or with the framework of law, when 'identification' is understood as agreement with or affirmation of them.

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[48] Cohen (1986), 286.

[49] On Neuhouser's reading of Rousseau, there are two kinds of freedom at issue—civil freedom and moral freedom—but each is only a limited kind of freedom; complete political freedom, on this reading, is achieved only when the citizen possesses both civil and moral freedom.

Rather, it is an identification with the political community and with its ongoing project of governance by law. Consider the case of friendship. As a friend, I identify with my friend and her good: to promote her good—sometimes by deferring to her—is, to an extent, also to promote my own good. This identification is immediate, for I am immediately moved, when appropriate, to respond to her needs and to act for her sake. And this identification remains immediate even when, confronted with her voiced judgment of what I should do, I doubt whether I should and so I step back and rationally reflect on both the reasons I have to do it—including the reasons of friendship that I have—and the reasons I have to refrain. Even though I reflect, in part, on the reasons arising from this identification with her and her good, my reflection need not call those reasons into question—doing so would be incompatible with the immediacy of this identification—only their relative strength compared to the other reasons at play. In this way, my disagreement, upon reflection, with what she asks me to do is compatible with my identification with her as a friend.

Now, I may at times also call the friendship itself into question, reflecting rationally on its grounds and on the reasons it gives me. But even this sort of rational reflection need not affect the immediacy of my identification and so my tendency to be moved to act for her sake. Since it is based on a mature trust in her, my care for my friend will remain despite any episodic doubts or questions I may have about the relationship on reflection. This relative imperviousness of my commitment to such doubts and questions is, I think, a virtue, for a stable commitment to the relationship seems essential for healthy, long-lasting relationships. And this imperviousness is not irrational when the relationship is a good one, since acting on the deliverances

of one's rational reflection is only one way of responding well to reasons; acting on the basis of a stable and justified commitment to another person is certainly another way. This commitment, of course, cannot be entirely impervious to the results of rational reflection, for such imperviousness would make it objectionable because irrational. Rational reflection, then, may appropriately change the nature of a person's commitments, though gradually: repeated reflections that the actions, etc., of a friend are inconsistent with genuine friendship will appropriately weaken (and perhaps eventually destroy) one's commitment to that person.

In the case of democratic citizenship, the citizen's political identification is an identification with the collective project of creating and sustaining a law-governed community of free and equal persons. It is, then, an identification with the political community created by the pursuit of this project, one that manifests itself in a commitment to see to it that one's own political choices help to realize this project. The identification, then, is first and foremost with the persons who make up the community—with one's fellow citizens as citizens—and so the appropriate feelings of loyalty are feelings of loyalty to them as fellow citizens engaged in this project, not necessarily feelings of loyalty to the laws themselves. In this way, the loyal citizen may reflect on individual laws and criticize them as unjust; indeed, so long as her political criticisms are motivated by her commitment to the community's project of justice—and so by her commitment to promote her fellows' interests in substantive justice—such criticisms will count as proper expressions of her loyalty. The proper sort of political identification, then, is compatible with the sort of critical engagement in politics that a healthy democracy requires.

And this remains true even when the citizen's critical reflection is

directed towards the fundamental laws of the community, towards the constitutional guarantees that define the project of justice. She may conclude, upon reflection, that the community's understanding, say, of freedom of speech—as expressed in the body of law related to speech—is quite flawed from the perspective of justice without that conclusion calling into question her justified trust that genuine civic care obtains among citizens. In this way, she may disagree with the basic terms that define the political community but still justifiably trust in the basic character of the political community as one committed to pursuing justice in law. Even wide-ranging critical political reflection by citizens is compatible with the sort of identification required for the relationship of co-citizenship to be characterized by mutual civic care and civic trust.

Someone might worry, however, that this talk of the individual identifying with the political community actually threatens the freedom of the reasonable and engaged citizen by threatening to dissolve her individuality. Whether it does depends, I think, on what the citizen is supposed to identify with, and so on what she is supposed to be motivated to promote. Identification would threaten individuality, for instance, were the citizen supposed to identify with the 'nation' understood as a distinct and strongly organic whole and so be moved to promote the good of this larger abstract entity over her own good and the good of those she cares about. In the extreme case, a citizen's identification with her nation may cause her to fail to recognize the other aspects of her own good—those aspects independent of this particular national identification—and so she may end up seeing herself as merely an agent of the nation. This sort of identification would threaten the dissolution of the citizen's individuality.

However, this worry seems misplaced when the citizen is supposed to identify with a community whose project is to create a society that respects each member's status as free and equal, for realizing the good of the community just is to see to it that each member is respected in these ways. The properly identifying citizen is not moved, then, to sacrifice the interests of the individual citizens—including her own interests—for the good of some larger entity like the nation, for the community's good just is to respect and promote its citizens' interests.[50] Properly identifying with this sort of political community requires recognizing that the interests of each citizen possess independent moral importance, and so this sort of identification does not threaten to dissolve the individuality of fellow citizens. Properly identifying with this sort of political community also requires recognizing the independent moral importance of one's own interests, especially those aspects of it not derived from the identification itself, for one is not really committed to the community's project of respecting *all* as free and equal if one is not prepared to insist that one deserves the same respect as the others. This sort of identification, then, does not threaten to dissolve the citizen's own individuality.

6. Democratic Community and Civil Disobedience

Rawls' treatment of civil disobedience in *A Theory of Justice* has been quite influential. It is important to note that Rawls restricts his account in *Theory* to the circumstances of a nearly just society, which he characterizes as "one that is well-ordered for the most part but in which some serious

[50] Granted, circumstances may require that some citizens forgo some goods for the sake of their fellow citizens, but this sort of situation, though regrettable, is unavoidable.

violations of justice nevertheless do occur."[51] By restricting his account of civil disobedience in this way, he is offering an account of the ideal case of civil disobedience, one that citizens of actual states are quite unlikely ever to face. What underlies Rawls' account of justified civil disobedience, particularly of his claim that the civil disobedient will have a duty to submit to the prescribed punishment for her disobedience rather than, at most, prudential or strategic reasons for such submission, is the importance of the rule of law. Submission by the disobedient to the legal consequences is required because doing so is the way for her, in circumstances of disobedience, to express publicly her commitment to the rule of law.

A nearly just society, for the Rawls of *Theory*, is a society whose citizens accept, for the most part, the same comprehensive liberal conception of justice as fairness.[52] But, as Rawls admits later and as I have argued throughout, this sort of society is impossible, for the burdens of judgment make that sort of agreement on a conception of justice impossible.[53] The sort of society that, though ideal, is still possible, is a democratic society whose citizens accept, for the most part, some liberal conception of justice; though they still disagree, sometimes deeply, about justice, the community is such that they have a duty of justice to uphold the law. The question, then, is whether justified civil disobedience is possible in these ideal circumstances of a democratic community, or whether it is only possible in non-ideal circumstances. My argument here is that Rawls' account, when applied to circumstances of a democratic community, is on the whole correct and so that, even in a democratic community—the ideal to which we ought to aspire in our

[51] Rawls (1999d), 319.
[52] Rawls (1999b), 179.
[53] Rawls (1999b), 179.

politics—civil disobedience can be a legitimate way to engage in politics.

And so our revised version of Rawls' question is: Under what conditions can it be justified for a citizen of an ideal democratic community to disobey the law? Rawls' answer, in short, is that it would be justified when the act of disobedience is public, nonviolent, conscientious and, importantly, *political*. By political, Rawls means that it is done in order to draw the majority's attention to the injustice in question with the aim of persuading them, by appeal to their shared sense of justice, to reform the relevant law or governmental practice.[54] As he puts it, civil disobedience as defined is a "mode of address" from the citizen to the majority of her fellows: She addresses them as moral persons by appealing to the society's shared conception of justice that underlies the political order.[55] In the circumstances of democratic community, she will address them slightly differently, by appealing to *one* (or several) liberal conception(s) of justice that may be interpreted as underlying the political order.[56] Though Rawls doesn't explicitly say so, I take it that civil disobedience so construed is, in these ideal circumstances, the only justified disobedience motivated by one's moral disapproval of the law.

Civil disobedience is special, Rawls argues, because it "expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof."[57] It's not clear quite what Rawls means by 'fidelity to law' here; at first glance, disobeying a law seems a clear case of a failure of fidelity to law, for, if fidelity requires anything, it would seem, it requires

[54] Rawls (1999d), 320.
[55] Rawls (1999d), 321.
[56] And so, to use Dworkin's terminology, the democratic citizen does acknowledge that 'integrity' is a value to be pursued in the political process. See Dworkin (1986).
[57] Rawls (1999d), 322.

obeying applicable laws. Granted, Rawls does say that civil disobedience is 'at the outer edge' of fidelity to law, and he claims that showing fidelity at this outer edge requires that one's disobedience be non-violent and that one accept the legitimate legal consequences of that disobedience. However, it's not obvious why these things are required by fidelity. I think we get a further clue by looking at Rawls' earlier discussion of civil disobedience, for at one point he says that civil disobedience is "a form of political action within the limits of fidelity to *the rule of law*."[58] I suggest that the outer edge of fidelity to law is precisely fidelity, not to particular laws, but to the rule of law in general: One's civil disobedience must still show respect to the community's project of governance by law because one has a duty of justice to be committed to that project.

For Rawls, showing this respect is done in two ways: (i) by using civil disobedience as a way to push for certain reforms of the community's law; and (ii) by showing one's commitment to governance by law by submitting to the legal consequences of one's disobedience. The first way is important because it reflects the fact that, in the society, there is a shared conception of justice that most citizens are committed to realizing and that successfully underlies most of the laws; the law that the civil disobedient is protesting is an aberration (even if a serious one), and an appeal to that shared conception is enough to reveal it as aberrant. A person may, then, disobey in this case because she can respect the project of law by doing so, so long as the disobedience is a call for reform meant to address her fellow citizens. To disobey simply because one disagrees with the law and without an intention to spark reform of the law is to disrespect the project of law and so also one's

[58] Rawls (1969), 249. Emphasis added.

fellow citizens, or at least those fellow citizens who are jointly and in good faith pursuing this project required by justice.

The second related way is important because, by submitting to the legal consequences, the civil disobedient publicly express her commitment *qua* citizen to being governed by her community's laws, so long as those laws, in the main, do codify genuine relations of right. Her submission shows this by showing that she understands that, on account of the duty of justice, the mere fact that she disagrees with some law does not, by itself, exempt her from the law's jurisdiction. If she were to claim an exemption here, she would be claiming something that, so long as she recognized the necessity of law, she could not allow others. If she is called to account for her disobedience, and it is done according to fair processes and procedures to which all are subject and by a legal apparatus organized towards the pursuit of a liberal conception of justice, she does not have the right kind of complaint that would justify non-submission.

Even if this account is correct, we are still able to accept David Lyon's forceful argument in "Moral Judgment, Historical Reality and Civil Disobedience" that it is a grave mistake to treat the resistance of Thoreau, Gandhi and King as justified because they were instances civil disobedience so defined. It is a mistake, he argues, because none of the three lived in a society that could have given rise to a justified presumption that one has an obligation to comply with the law, and so they were not morally required to express their principled moral disapproval of the law in the way Rawls' justification of civil disobedience would require of them.[59] In each case, there existed "significant,

[59] I do not intend to claim here that Rawls himself made this mistake nor that Lyons claims he does. Lyons critique is directed against many other theorists of civil disobedience (though they adopt positions that are the same as Rawls' in the relevant parts.)

systematic injustice that [was] deeply entrenched," and so that society failed to count as nearly just.[60] Specifically, this entrenched injustice was manifested in each case in significant departures from the rule of law that were not merely aberrations or episodic departures but rather were taken when observing the rule of law stood in the way of achieving oppression and domination; these departures, then, belied any professed commitment to a collective pursuit of justice.

It would be a mistake to insist, on the basis of Rawls' account of civil disobedience, that antebellum American abolitionists, Indians of the British Raj and Jim Crow-era African-Americans could only justifiably disobey in ways that addressed the majority and their shared conception of justice, for it is far from clear that there was, in any of the three cases, a sufficiently shared conception of justice such that the project of law was a project of a genuine community. Lyons is right to assert that, for none of these three figures—Thoreau, Gandhi and King—did the law have any real moral force *qua* law that they had a duty to honor in their resistance. But, in the ideal case of a democratic community, the fact that the legal system observes the rule of law matters for how a citizen may, consistent with her duty of justice, respond to what she takes to be a legal injustice: because the state is nearly just, fidelity to the rule of law requires submitting to the legal consequences of one's principled disobedience.

[60] Lyons (1998), 35-6.

VIII. CONCLUSION

Citizens of a suitably democratic community will have an important duty to uphold their community's laws, even those laws they reasonably think to be unjust, because upholding the law is required if they are to respect their fellows as free and equal citizens in circumstances of reasonable disagreement about justice. This 'democratic community' account of political obligation is motivated primarily by a concern to explain the hardest kind of case confronting an account of political obligation: The case of an engaged and conscientious citizen—a citizen whose main aim is to live justly—who is confronted by a law she reasonably thinks to be unjust. How is it that she can have a duty to uphold that law, a duty that overrides her usual right, as a free person, to act on her own moral judgments?

The argument draws upon a novel claim about close personal friendships. In certain circumstances of disagreement (including moral disagreement), a close friend can have a duty of friendship not to act on his own judgment but rather to defer to his friend's judgment. I defended this claim by showing how this duty is internal to the valuable relationship of close friendship: one friend's duty of care for the other results in a duty to defer to her in those circumstances where deference promotes her interest in responsibly exercising her agency. And, drawing on this argument about deference in close friendships, I argued that democratic procedures result in authoritative law only when those procedures are embedded within a democratic *community* whose citizens are motivated, in their political choices, by genuine ties of civic friendship. And they do so because, when citizens are so motivated, deferring to their judgment by upholding a law with which one disagrees counts as respecting and promoting their interest in responsibly

exercising their agency with regard to questions of justice.

In other sorts of political communities, including those reasonably just ones that nevertheless fall short of democratic community, citizens do not have a duty to uphold the law. And so, this account is, like Simmons' consent account, a version of philosophical anarchism, for it claims that no existing state's laws possess authority over its citizens. Like Simmons, I do not think that this anarchist result is or points to a flaw in the account. But my reasons for thinking that it is not a flaw are different than Simmons'. As I have argued, citizens of communities that fall short of democratic community will still have various non-consent-based political duties other than the duty to uphold the law. These will include both duties of fairness to support certain beneficial cooperative schemes and duties of justice, and it may be that the legal system in justified in enforcing those duties even though it lacks legitimate authority.

And, though I can only sketch this sort of view here, the political and legal institutions in such communities may be justified in coercively enforcing their determinations of these various duties even though citizens lack a duty to obey. Or, in other words, legitimacy is not an all-or-nothing sort of thing: there are different levels of legitimacy that a state (or legal system) may achieve. The legal system of a genuinely democratic community—one whose citizens have a duty to uphold the law—possesses what might be called 'full legitimacy.' To borrow terminology from William Edmundson, there are two lower levels of legitimacy that a legal system might possess: 'modest legitimacy' and 'weak legitimacy.'[1]

On Edmundson's use of the terms, weak legitimacy, modest legitimacy,

[1] Edmundson (1998), 40-42.

and 'strong' (or, to use my term, full) legitimacy are competing standards of state legitimacy. He presents them in the form of three mutually incompatible legitimacy 'theses':

> *Weak Legitimacy Thesis*: Being a legitimate authority entails having a general (justification) right forcefully to administer one's authoritative directives.
>
> *Modest Legitimacy Thesis*: Being a legitimate authority entails that one's authoritative directives create in one's subjects an enforceable duty not to interfere with their forceful administration.
>
> *Strong Legitimacy Thesis*: Being a legitimate authority entails that one's authoritative directives create in one's subject an enforceable duty of obedience.[2]

My account, of course, rejects both the weak and modest legitimacy theses, for it holds that a fully legitimate authority is one whose authoritative directives create in its subjects an enforceable duty of obedience. However, both theses identify conditions that, though not legitimacy, nevertheless count as moral achievements. A legal system that has a general justification right forcefully to administer its directives is morally better than one that does not, and a legal system whose directives create in its citizens an enforceable duty not to interfere with their forceful administration is morally better than one that only possesses a justification right to administer them forcefully. In this way, a legal system that fails to possess the authority it claims can nevertheless be weakly or modestly legitimate; and, when it is, that counts as a moral achievement. Of course, it would be morally better for a weakly legitimate authority to be a modestly legitimate one and a modestly legitimate one to be fully legitimate. And so, weak legitimacy and modest legitimacy are, to that extent, incomplete moral achievements. But they are nevertheless

[2] Edmundson (1998), 43.

achievements.

In this way, that the law of the United States does not have the authority it claims to have—it lacks full legitimacy—does not by itself imply that those American officials charged with enforcing the law are, morally speaking, nothing more than particularly successful thugs.[3] The law of the United States most certainly possesses weak legitimacy. And it arguably also modest legitimacy, at least, say, for those laws that determine the level of taxation required of citizens to support the provision of freedom-enabling public goods: it would be wrong to interfere with the forceful administration of these (reasonable) laws, even when one reasonably disagrees with the law's determination of the level of contribution required by the duty of fairness. And it would be wrong even though the law's determination of the level of contribution lacks authority over citizens.

That the law of the United States lacks full legitimacy is important, for the law *qua* law claims to have such legitimacy. And so, even if it does have modest legitimacy, that the legal system fails to have the authority it claims is itself a problem: the law presents itself to citizens falsely as possessing authority over them. The solution to this problem, though, is not to call into question the project of governance by law but rather to reform the laws and legal system so that they might achieve full legitimacy. Or, more precisely, the solution to this problem is reform, but only on the assumption that the project of governance by authoritative law is the appropriate kind of political governance for a community of free and equal persons to pursue. And justifying law as the appropriate kind of governance requires vindicating

[3] Rolf Sartorius understands the denial of political authority to imply just this. See his "Political Authority and Political Obligation" (1999), 144. For earlier discussion, see Chapter 1, Section 3.

law's claim to authority by showing that it is possible for the law to achieve genuine authority over free and equal citizens. And so, vindicating this aspiration just consists in providing a solution to the problem of narrow political obligation for a liberalism of freedom. The democratic community account does just that.

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